U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 13Nov2002

CASE NO.: 2001-STA-00052

IN THE MATTER OF:

STEPHEN W. FITZGERALD, SR.
Complainant

v.

INTERACTIVE LOGISTICS, INC.
D/B/A NATIONAL FREIGHT, INC.
OR NFI INTERACTIVE
Respondent

Appearances:

Paul O. Taylor, Esquire
For the Complainant

Gregory T. Arnold, Esquire
For the Respondent

Before: **DAVID W. DI NARDI**
District Chief Judge

I. RECOMMENDED DECISION AND ORDER

This cases arises from a complaint filed by Stephen W. Fitzgerald, Sr. (the "Complainant" or Fitzgerald) against the NFI (the "Respondent") under the employee protection provisions of Section 406 of the Surface Transportation Assistance Act of 1982 ("STAA"), 49 U.S.C. §31105, and the implementing regulations at 29 C.F.R. Part 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. The matter is before me on the Complainant's request for a formal **de novo** hearing and objection to the findings issued by the Regional Administrator after investigation of the complaint. 49 U.S.C. §31105(b)(2)(A), 29 C.F.R. §1978.105.

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Complainant filed an employment discrimination complaint under the STAA on January 12, 2001. (ALJX-1) Complainant alleged that Respondent illegally retaliated against him on January 3, 2001 when it discharged him. Respondent Interactive Logistics, Inc. operates under the name "NFI Interactive."(hereinafter "NFI"). After an investigation, the Occupational Safety and Health Administration (OSHA) issued a preliminary order pursuant to 49 U.S.C. § 31105 on July 3, 2001. (ALJX-3). Complainant on July 12, 2001 timely filed an objection to the Secretary's preliminary order and requested a hearing before the Office of Administrative Law Judges. (ALJX-17). OSHA referred the complaint to the Office of Administrative Law Judges on July 3, 2001 and the matter was assigned to this Administrative Law Judge for purposes of conducting a **de novo** hearing in this matter. Pursuant to a Notice of Hearing and Pre-Hearing Order (ALJX-17), and after several postponements for good cause shown, a formal hearing was held in Boston, Massachusetts on June 18 and June 19, 2002, during which time the parties were afforded the opportunity to present testimony and documentary evidence. The parties filed post-hearing briefs. Respondent's reply brief was filed on October 9, 2002. As no other pleadings have been filed by the parties, the record is hereby closed. The matter is now ready for resolution.

I have thoroughly considered the totality of this closed record, and all evidence has been reviewed by me and I will now highlight parts of the record. The following references shall be used herein: TR for the official hearing transcript, ALJX for an exhibit offered by the Administrative Law Judge, CX for an exhibit offered by the Complainant, JX for a joint exhibit and RX for an exhibit offered by the Respondent.

At the outset I note that at the hearing held on June 19, 2002, I denied the Respondent's oral motion for a summary judgment wherein the Respondent claimed that the Complainant had failed to prove a **prima facie** case at the hearing. I ruled that the Complainant had proved a **prima facie** case of discrimination under the STAA and the burden then shifted to the Respondent to articulate a legitimate, nondiscriminatory reason for its discharge of Complainant. For the reasons stated below, Respondent has not done so and judgment will be rendered in favor of Complainant.

A. BACKGROUND INFORMATION

Complainant is a licensed commercial truck driver. Interactive Logistics, Inc. (hereinafter "NFI" or "Respondent") operates under the name "NFI Interactive." (TR 340). National Freight, Inc. hired Complainant to operate commercial vehicles in interstate commerce. Complainant, who had previously quit his employment with National Freight, Inc., returned to work for NFI in August 1999. (JX-1; TR 151-154; TR 340) NFI's vehicles had a gross vehicle weight rating of 10,001 pounds or more. (JX-1). NFI Industries owns NFI.

National Freight, Inc. is NFI's sister company. (TR 340).[1]

At its Framingham, MA facility, NFI serves one customer, Poland Springs Bottling Co. (TR 83-84; TR 152; TR 419). NFI has an office in the customer's facility. (TR 49; TR 84; TR 455). NFI drivers deliver bottled water from Framingham, MA to distributors in the Northeastern United States. (TR 83-84). In December 2000 and January 2001, NFI had five office employees at Framingham, MA. (TR 370: TR 456).

Complainant who had previously worked for NFI left to work elsewhere and upon his return to employment with NFI, Fitzgerald originally operated a "day cab" truck that was not equipped with a sleeper berth. When Complainant drove a day cab for NFI, he delivered to such nearby locations as Hawthorne, NY, Long Island, NY and Somerset, NJ. (TR 154; TR 161). In April 2000, Complainant was assigned to operate a truck equipped with sleeper berth. (TR 160-161). The sleeper berth can be utilized for sleeping. (TR 440; 49 C.F.R. § 393.76) Once Complainant was assigned a truck equipped with a sleeper berth, he began transporting bottled water to locations such as Syracuse, NY and Buffalo, NY which were farther away from Framingham, MA than the points where he delivered when he operated a day cab for NFI. (TR 161-162). Another NFI driver, John Melvin, also operated a truck equipped with a sleeper berth. (TR 42). Complainant's dispatches usually required nighttime driving. (TR 90; TR 147; TR 239; CX-6).

When Complainant drove a truck equipped with a sleeper berth his usual scheduled departure time was between 8:00 p.m. and 9:00 p.m. (TR 162-163). The actual departure time varied and it was not uncommon for delays of up to four hours to occur. (TR 87; TR 178). Delays were more frequent than on-time departures. (TR 178). Additionally, shipments were often ready for an early departure. (TR 96; TR 178). Once loading of shipments began at Framingham, MA, loading generally took from one-half hour to 45 minutes. (TR 88). The transit time from Framingham, MA to Syracuse, NY varies from four to six hours depending upon traffic and weather conditions. (TR 162; TR 451-452). The scheduled delivery time to the customer in Syracuse, NY was 10:00 a.m. (TR 92; TR 447; CX-7, p. 2). NFI tried to allow its drivers an extra two hours leeway in their schedules so they could meet a delivery schedule. (TR 91).

Dan McCloskey was the manager of NFI's Framingham facility when Complainant returned to employment with NFI. (TR 154). John Patten and Ron Lavertu also supervised Complainant. (TR 89). Patten later became manager for NFI's Framingham facility when McCloskey because a part-time employee. (TR 154; TR 159-160; TR

[1]In the interests of judicial efficiency and to expedite this decision as I shall be retiring shortly, I have adopted portions of the pleadings filed by the parties. I have accepted and credited certain arguments made by the parties. Other arguments have been specifically rejected and this rejection means that by implication I have rejected other arguments made by the parties. I have thoroughly reviewed all of the evidence presented herein.

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B. FITZGERALD'S COMPLAINTS ABOUT RECORDING WAITING TIME

Complainant repeatedly complained to Patten about how to record on his daily logs time spent while waiting for loads at the Framingham facility. Complainant told Patten on several occasions that he believed his time spent waiting for shipments at the Poland Springs facility should be recorded on his record of duty status as "on duty (not driving) time. Patten told Complainant that this time should be recorded on his logs as "off-duty" time. (TR 165-167).

On one occasion Complainant, Melvin and Patten had a conversation at a picnic table outside of the facility at Framingham, MA. (TR 48-50; TR 162-164). The subject of this discussion was how drivers should record on their daily logs their time waiting at the Poland Springs facility. Complainant told Patten that this time should be recorded as "on duty (not driving)" time. Patten again told Complainant that he should record this time as "off duty" time. (TR 166) Complainant told Patten that he was did not know "what the f--- " he was talking about. (TR 51; TR 164). Patten did not discipline Complainant for saying this. (TR 165). Patten confirmed that the conversation took place and involved how to record on daily logs waiting time. (TR 426; TR 465-466).[2] Patten stated that the conversation also involved the 15-hour rule that prohibited a driver from driving after being on duty more than 15 hours without having had an 8-hour break. (TR 425; TR 461-466). **See**, 49 C.F.R. § 395.3(a)(2).

C. COMPLAINTS ABOUT DRUG AND ALCOHOL TESTING POLICY

NFI requires its drivers to submit random to drug and alcohol testing. (CX-3; TR 167; TR 348). NFI tested Complainant for drugs and alcohol on November 20, November 23, and December 23, 2000. (TR 392). After the third test, Complainant asked Patten why he was being tested so often. (TR 172). Patten said that he received E-mails from NFI's office in Vineland, NJ directing that certain drivers be tested and that was all he knew about it. (TR 172).

After Complainant spoke with Patten about drug and alcohol testing, he spoke with a person he thought was named "Linda" in NFI's Safety Department to inquire about its drug and alcohol testing policy. Complainant told the individual that he had been tested 3 times in a short period of time for drugs and alcohol and that he had received advance notice of a "random" test. (TR 173-174). The individual told Complainant to ask Patten why he had been tested the way he had and call her back. (TR 174). Anne Johnson, NFI's Director of Human Resources, testified that NFI did not employ anyone by the first name of "Linda" in its Safety

[2] Patten denied that Complainant told him that he did not know "what the f---" he was talking about during this conversation. (TR 426; TR 466).

Department in Vineland, NJ in 2000. (TR 342).

Complainant told Patten that he had spoken with NFI's home office about drug testing. Complainant testified that Patten replied, "Why the f----did you do that? You got me in a lot of trouble with the Safety Department." (TR 175; TR 268). Complainant said, "That wasn't my concern. If you had answered me the question that I wanted to know, I would have never called them." (TR 175). Patten testified that he recalled speaking with Complainant about his having been subjected to multiple drug and alcohol tests. (TR 427-428; TR 443). Patten also testified that Complainant might have told him that he had spoken with NFI's Safety Department about drug and alcohol testing. (TR 428).

D. COMPLAINT'S LETTER AND INFORMATION GATHERING CAMPAIGN

During Complainant's employment with NFI, he raised safety issues with Patten five to ten times. (TR 479). On one occasion he complained to Patten that he had been injured on the job because a landing gear on a trailer did not operate properly. (TR 480). Another time Complainant told Patten that the trailer doors did not close properly. (TR 480). During one trip a highway patrol officer near Milford, CT stopped Complainant when a wheel nearly came off one of the trailers he was transporting. Complainant complained to Patten about this event. (TR 482). On other occasions Complainant complained to Patten about defective lighting on his assigned vehicles. (TR 484).

At one point Al Laffen was a conduit for complaints that other drivers had about various matters. Laffen gathered information from the drivers and brought them to the attention of management officials with NFI. (TR 484-488). After Laffen became a mechanic for NFI, Complainant began receiving complaints from drivers. (TR 488). Some of these complaints involved driver complaints about the excessive amount of time spent waiting for their loads at the Poland Springs facility. (TR 488). The drivers complained to Complainant that the waiting time and associated delay were causing them to become tired while driving. (TR 486). In late 2000, Complainant began collecting information from other NFI drivers about waiting time, recording of time on logs, fatigue caused by delays, equipment safety and other such problems. (TR 486; TR 497). Complainant intended to collect this information from the drivers and bring it to NFI's management in the form of a letter shortly after January 1, 2001. (TR 495).

On December 9, 2000, NFI had a Christmas Party for its Framingham-based employees. (TR 491). Patten and Lavertu attended this party, as did more than half of NFI's drivers, including Patten and Melvin. Al Laffen also attended. (TR 456-457; TR 494-496). At the party, Complainant spoke with other drivers to ask them for information so that he could complete and send his complaint letter to NFI Management. Complainant intended to present this information to NFI Management after January 1, 2002. (TR 495).

E. EVENTS OF JANUARY 2-3, 2001 LEADING TO TERMINATION

The Poland Springs facility at Framingham was shut down during the last week of December 2000 until January 2, 2000. (TR 89; TR 176). Complainant knew that he would return to work on January 2, 2001 and that he was likely to have a dispatch requiring night driving. (TR 176-177; TR 239-240; TR 445-446). Complainant's load to Syracuse, NY was originally scheduled to depart at 10:00 p.m. on January 2, 2001. (CX-7, p. 2, n. 1; TR 447)

Between noon and 1:00 p.m., January 2, 2000, Complainant called Dan McCloskey at NFI to inquire about his next dispatch assignment. (TR 183-184). McCloskey told Complainant that he did not know when his next load would be ready but that it would probably be ready around midnight that evening. McCloskey told Complainant to call back and talk to Ron Lavertu around 5:00 p.m. to find out about his dispatch assignment. (TR 184-185). Thereafter, Complainant tried to sleep at his home during the day but was unable to obtain any meaningful sleep. (TR 239)

At about 5:00 p.m. January 2, 2001, Complainant called NFI and spoke with Lavertu. (TR 185-186).[3] Lavertu told Complainant that two loads were going out that night. Lavertu said that one load would be going to Buffalo, NY and that the other load would be going to Syracuse, NY. Lavertu told Complainant that the load for Buffalo, NY was ready to depart. (TR 186). Complainant volunteered to take the Syracuse load since the Buffalo load was a longer drive. Lavertu agreed. (TR 186-187; TR 248). Lavertu told Complainant that his dispatch would be ready around midnight. (TR 99; RX 7, p.2).

Complainant arrived at the Poland Springs facility at about 8:00 p.m. January 2, 2001. (TR 188). Complainant reported for work because Melvin's load to Buffalo, NY had been ready early and he thought his own load might be ready early as well. (TR 248). After parking his assigned truck, Complainant reported to Interactive Logistic Inc.'s office and informed Lavertu of his arrival. Lavertu was surprised to see Complainant at work already since he had told Complainant that his dispatch to Syracuse, NY would not be ready until midnight. Lavertu told Complainant that his dispatch was "running late" and that he should rest in the sleeper berth of his assigned truck until his dispatch was ready. (TR 100). Complainant went to his assigned truck and attempted to sleep in the sleeper berth. Complainant, however, was unable to sleep. (TR 191).

Between 10:30 p.m. and 11:00 p.m. January 2, 2001, Lavertu notified Complainant that he could couple his assigned truck to the trailer that he would be taking to Syracuse, NY. (TR 107: TR 192). The trailer was not yet fully loaded with the Poland Springs

[3] Lavertu recalled that Complainant called him at 6:00 p.m. but testified that the call may have come at 5:00 p.m. January 2, 2001. (TR 97).

product that Complainant was going to deliver to Syracuse, NY. (TR 108). Complainant coupled his assigned truck to his assigned trailer. After coupling, he re-entered the sleeper berth of his assigned truck and attempted to sleep. He was unable to sleep. (TR 196).

Between midnight and 12:30 a.m., January 3, 2001, Complainant exited his assigned truck to speak with Lavertu about when the load for Syracuse, NY would be ready. (TR 194-195). Complainant had been in his truck but did not feel or hear any activity in the trailer to which the truck was coupled as he normally heard and felt when a trailer was being loaded. (TR 202). Complainant asked Lavertu when his load would be ready. Lavertu told him that Poland Springs was still having production problems. (TR 195). Complainant again tried to sleep in his assigned truck but was unsuccessful. (TR 196).

Between 1:30 a.m. and 1:45 a.m. January 3, 2001, Complainant told Lavertu that he was tired and that he did not think he could drive to Syracuse safely because he was concerned that he might fall asleep. (TR 198-199). Lavertu told Complainant that NFI had provided him with a truck with a sleeper berth to operate. (CX-13). Complainant again told Lavertu he felt “too tired” and that he did not think he could take the load safely to Syracuse, NY. (TR 111). Lavertu clearly understood Complainant to be saying that he was too tired to safely transport the load to Syracuse, NY. (TR 112). Lavertu told Complainant that he, Lavertu, could take the load. Complainant told Lavertu “I am not you and you are not me.” He also told Lavertu that if he was forced to take the load and had an accident that he would tell authorities that he had been forced to drive. (CX-13; TR 118; TR 199-200).

Shortly after 2:00 a.m. on January 3, 2001, Complainant decided that he was not going to take the load to Syracuse, NY that morning because he was “too tired” and was concerned that he might fall asleep, thereby constituting a hazard on the highways to himself and to the general public. (TR 200-201) He told Lavertu that he was tired and would not take the load. Lavertu clearly understood that Complainant believed he was too sleepy to safely deliver the load to Syracuse, NY. (TR 111). Complainant drove the truck to his home slowly. (TR 205).

At 2:09 a.m. January 3, 2001, Lavertu sent an e-mail to Patten and McCloskey stating, **inter alia**:

“It’s now almost 2 a.m. and Fitzi is still in the door waiting to be loaded due to problems with the lines. Mike can’t run D-Cap until he finishes all the 5 gal Handle he is going to run...just had a little problem with Fitz. He told me that if they did not start loading his trailer soon he was not going to run it b/c he was tired. I asked him what the point of having a sleeper was and he informed me that it was for the guys who run and stay over night etc. He also told me that he had been up since noon and when was he supposed to get sleep w/having to make 3 phone calls to this

place during the day and calling me this evening. I told him I always found time to sleep when I was "over the road". He then informed me that he was not me and I was not him and he had no problems telling someone that he was under forced dispatch if he ran and he cracked the truck up. He didn't think that he could run 5 or 6 hours. I told him that if he didn't think he could do it to not do it. **I'm tired of arguing with this guy and listening to him complain about everything. Is there something we can do? Is he that valuable to us? I've always been a little wary of him but when he mentioned being under forced dispatch, etc...the red flags went up all over the place."** (CX-13; TR 112). (Emphasis added)

Lavertu sent the E-mail (CX-13), in part, because he was frustrated with Complainant's refusal of the Syracuse load. (TR 120). Patten read the E-mail later that morning when he arrived at work. (TR 429).

Poland Springs finished production for the Syracuse, NY shipment at 2:30 a.m. January 3, 2001. (TR 101; TR 449). If Complainant had taken the shipment, he would have had to perform a daily vehicle inspection of his assigned truck and trailer before he drove it.[4] Additionally, Complainant would have had to close the doors on his assigned trailer and complete paperwork before he left the Framingham facility. (TR 103-104; TR 106). If Complainant had taken the shipment to Syracuse, NY he would have departed the Framingham facility no earlier than 2:45 a.m. January 3, 2001. (TR 106).

On the afternoon of January 3, 2001, Complainant telephoned NFI to find out about that evening's work assignment for him. (TR 73; TR 206). Patten answered the telephone and transferred the call to his private office. (TR 430). Nobody was present in Patten's office other than Patten when he spoke with Complainant. (TR 472). Steven Fitzgerald, Jr. shares an apartment with Complainant and was able to hear his father's conversation with Patten because Complainant was using a speakerphone. (TR 70-72).

During their conversation on January 3, 2001, Patten told Complainant he was still trying to cover the load to Syracuse that Complainant had declined earlier that morning. (TR 207; TR 444). Complainant told Patten that it was not his problem and that he had been too tired to take the load safely to Syracuse, NY. (TR 74; TR 431). Patten testified that Complainant told him that he, Patten, did not know "What the f---" he was talking about and that Patten did not know how to do his job. (TR 432-434). Complainant testified that he did not tell Patten on January 3, 2001 that he did not know how to his job and that he did not use profane language when speaking with Patten at that time. (TR 211). Complainant confirmed his version of the conversation with Patten. (TR 73-75). Patten then discharged Complainant. (TR 74; TR 211;

[4] 49 C.F.R. §§ 392.7 and 396.13 require that truck drivers assure themselves that their assigned vehicles are in good working order and safe driving condition before they operate them.

TR 434). Patten testified that he discharged Complainant because he was insubordinate and used profanity directed toward him during their telephone conversation on the afternoon of January 3, 2001. (TR 435).

F. POST-TERMINATION ACTIVITIES

On the day Patten fired him, or no later than the day after, Complainant contacted the Safety Department of NFI to complain about his discharge and to see if he could be reinstated. (TR 212). Complainant told the person with whom he spoke in the Safety Department that he had been discharged because he had refused a load because he was tired. (TR 212).

Complainant also spoke with Anne Johnson. (TR 231; TR 354-355). Complainant told Ms. Johnson that Patten had terminated him and that he was protesting the discharge. (TR 354). Johnson told Complainant that she would investigate the matter and call him back. (TR 354). Johnson and Harry Carlson, NFI's Senior Vice-President of Operations, investigated Complainant's discharge. After the investigation was completed, they called Complainant. Complainant testified that Johnson and Carlson had told him he had been discharged for insubordination and for refusing a load. (TR 232). Johnson testified that she told Complainant that he had been discharged by NFI for "insubordination". (TR 356). Johnson had authority to rescind Complainant's discharge. (TR 378-379). NFI has reinstated other drivers who had been discharged. (TR 380). Complainant was denied reinstatement.

Complainant timely filed a complaint against Respondent with the U. S. Department of Labor pursuant to the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105. On July 3, 2002, the Secretary of Labor issued an order. (RX-2). Complainant timely filed objections to the Secretary's findings and order on July 12, 2002 (CX-12; TR 220) and requested a formal hearing before the Office of Administrative Law Judges.

II. COMPLAINANT'S DAMAGES AND MITIGATION

Patten testified that Complainant was assigned to a truck equipped with a sleeper berth in April 2000. (TR 421). Complainant testified his weekly pay increased after he was assigned to drive a truck equipped with a sleeper berth. (TR 231). NFI's records of Complainant's wages reflect that Complainant's weekly pay increased significantly with the paycheck dated April 14, 2000. (CX-10, p. 5; TR 230-231). During the 38-week period from April 14, 2000 to Complainant's discharge, his gross wages were $50,008.24. Thus, his average weekly wage from April 14, 2000 to January 3, 2001 was $1,316), and I so find and conclude.

After NFI discharged him, Complainant sent more than thirty (30) resumes to prospective employers. (TR 226-227; TR 229) Complainant looked for employment in the want ads of the **Boston**

Herald newspaper. (TR 225; RX 4, p. 13). He also registered on-line with the Commonwealth of Massachusetts for purposes of obtaining employment. (TR 226-227). Complainant's first job after NFI discharged him was as a driver for Boston Coach. (CX 11, TR 221). He earned $8,241.37 from Boston Coach in 2001. (CX 11, p. 1). He earned $8,964.73 from Boston Coach in 2002. (CX 11, p. 2). Complainant earned $9,506.40 from Coach USA in 2002 through the pay period ending June 9, 2002. (CX-11, p. 3 & 4). Complainant earned $13.20 per hour with Coach USA. (CX-11, p. 4). Complainant was employed with Coach USA as of June 18, 2002. (TR 150).

III. Respondent's Version of these Events

A. OVERVIEW

This case involves an employee who was fired for insubordination after he engaged in a heated conversation with his superior in which he told his supervisor, in no uncertain terms, that he did not know what he was doing and that he did not respect his supervisor's authority.[5]

Following his termination, Fitzgerald initiated a series of complaints with various federal and state agencies and sent letters to various news outlets. Depending upon the entity to whom he was complaining, Fitzgerald's stated rationale for his termination differed. He told one federal agency the "real reason" he was fired was an information gathering campaign. He told others that it was over complaints about drug testing policies or being fatigued. The only constant in his complaints is that he painted the Respondent as a horrendous employer who had no concern for the safety of its employees. In spite of this, Fitzgerald now seeks his old job back.

During the course of the trial in this matter, it was clear that the post-termination rationales given by Fitzgerald were, at best, speculative and, at worst, contrived in order to try and build a case from nothing. This was evident from the numerous times that Fitzgerald changed his testimony during trial, constantly retracting statements he made earlier when confronted with contradictory evidence. Respondent has submitted specific examples of Fitzgerald's changing testimony in a chart in its brief.

This case was tried over the course of two (2) days. **See**

[5]As a general matter, Respondent continues to object to the Court's consideration of matters that counsel for Complainant, Stephen W. Fitzgerald ("Fitzgerald" or "Complainant") had expressly represented prior to trial that he would not be proceeding on. In particular, this objection goes to the Court's decision to introduce the issue of Mr. Fitzgerald's claimed "information gathering" or "letter writing" campaign at the opening of the hearing. Respondent notes that the Court indicated during trial that it felt constrained to do so by the decision in **Seater v. Southern California Edison Company**, 95-ERA-13 (ARB Sept. 27, 1996). Respondent continues to believe that the introduction of that issue by the Court was unwarranted.

generally, Transcript of Hearing, June 18, 2002 ("Day 1") and Transcript of Hearing, June 19, 2002 ("Day 2").[6] The parties also submitted a Stipulation concerning certain matters that had been stipulated to prior to trial. **See** Joint Exhibit # 1 (the "Stipulation").

In addition to the Stipulation, prior to trial counsel for the Complainant represented to counsel for Respondent that, although mention was made in Fitzgerald's Pre-Hearing Statement of a "letter writing" or "information gathering" campaign, he would not be proceeding at trial under the theory that Mr. Fitzgerald's termination was in any way related to such claimed activity. **See** Day 1, p. 305 (Taylor). However, during the trial there was testimony on this subject and the Court indicated that, over Respondent's objections, it was inclined to take it into consideration in making any decision, pursuant to the Administrative Review Board decision in the **Seater** case. 95-ERA-13 (Sept. 27, 1996).

Mr. Fitzgerald was employed by Respondent from August 1999 to January 3, 2001. **See** JX 1, ¶ 1. Mr. Fitzgerald originally began his employment driving a day trailer; however, in the Spring of 2000 he and another driver, John Melvin, were assigned sleeper cabs in order to perform overnight runs. **See** Day 1, p. 154, l. 12-22; p. 161, l. 2-22 (Fitzgerald); Day 2, p. 424, l. 13-19 (Patten). These runs were typically ready between 8:00 p.m. – midnight. **See** Day 1, p. 44, l. 3-5 (Melvin).

Respondent had a Drug Testing Policy in place for all of its drivers, which was administered on a random basis, done by computer selection of drivers. **See** Day 2, p. 394, l. 18-23 (Johnson); **see also** CX-3; Day 2, p. 427, l. 1-7 (Patten) (Patten ostensibly had no authority to send drivers for drug tests if not selected by the computer). As drafted and applied, the random selection of a driver at any given time had no impact whatsoever on that driver's eligibility for being selected during the next random selection. **See** CX-3.

In the Fall of 2000, Fitzgerald was, over the course of several weeks, subjected to three (3) random drug tests in accordance with Respondent's Drug Testing Policy. **See** Day 1, pp.166-170 (Fitzgerald).

Shortly after he began driving a sleeper cab, Mr. Fitzgerald had a conversation with John Patten ("Patten"), concerning the logging and pay of "off-duty" hours. **See** Day 1, pp. 163-164 (Fitzgerald). Although there was conflicting testimony as to certain aspects of the conversation, it is clear that the conversation revolved around the general subject of logging of

[6]Citations to the testimonial record are cited as "Day 1" for citations to June 18th or "Day 2" for citations to June 19th, followed by a line and page reference and a parenthetical indicating the identity of the witness whose testimony is being cited, e.g., "Day x, p. xxx, l. xx-xx (Witness).

hours and pay, and was both pleasant and cordial in nature. **See** Day 1, p. 164, l.9 (Fitzgerald) (the conversation had a "joking around" atmosphere); pp. 51-53 (Melvin); Day 2, p. 425, l.17 - p. 426, l. 10 (Patten).

Fitzgerald initially testified that he had no problems whatsoever with John Patten. **See** Day 1, p. 257, l. 1-21 (Fitzgerald). However, in what was a pattern throughout his testimony, after being shown documents, Fitzgerald's testimony on this point changed, according to the Respondent.

In particular, after being shown his prior affidavit, in which he called Mr. Patten a "liar" who "was impossible to work with," Fitzgerald admitted that he did have issues with Mr. Patten throughout his employment. **See** Day 1, p. 258, l. 1 – p. 259, l. 18 (Fitzgerald)

Respondent submits that many of these issues arose from Fitzgerald's constant complaining about matters beyond the control of Mr. Patten and the dispatchers, such as which loads needed to be run on what days (a decision based on customer needs), production delays (which were the province of Poland Springs) and rate of pay. **See** Day 2, pp. 436-437 (Patten); p. 121, l. 12-22 (LaVertu)

Respondent concedes that Fitzgerald, on occasion, raised general "safety-related" complaints. **See, e.g,**. Day 2, pp. 484 (discussed improper logging about 2 times); 491 (maybe noted that a mud flap was up) (Fitzgerald).

B. THE EVENTS OF JANUARY 2-3, 2002

After having at least a week off, Fitzgerald was scheduled to work on January 2, 2001. **See** JX-1, ¶¶ 12-13. That morning he awoke around 7:00 a.m. **See** Day 1, p. 181, l. 3-5 (Fitzgerald)

Although he originally testified that he awoke at a similar time on the two days preceding January 2nd, under cross-examination and after being shown his answers to interrogatories, Mr. Fitzgerald acknowledged that on the prior two (2) mornings he had slept until approximately 10:00 a.m. **See** Transcript, Day 1, p. 236, l. 18 – p. 238, l. 20 (Fitzgerald); RX-4, Answer No. 1.

Respondent submits that, contrary to Complainant's testimony on direct examination, he knew at 12:00 noon on January 2nd that his load would not be ready until at least midnight.

Around 12:00 noon on January 2nd, Fitzgerald called into Respondent's office and spoke to Dan McCloskey. **See** Day 1, p. 184, l. 1-4 (Fitzgerald). On direct examination, Fitzgerald testified that during this phone call McCloskey stated that he did not know when Fitzgerald's load would be ready and that he should call in around 5:00 p.m. for additional information. **Id**. 1, p. 184, l. 5 – p. 185, l.7 (Fitzgerald).

However, this testimony is directly contradicted by a statement contained in an Affidavit signed by Fitzgerald in February of 2001, in which he stated that during this telephone call McCloskey informed him that his load would not be ready until "around midnight." **See** RX-22, p. 4. When confronted with his prior contradictory statement, Fitzgerald admitted that McCloskey had mentioned to him that his load was not expected to be ready until midnight. **See** Day 1, pp. 243-244, 249, l. 9-14 (Fitzgerald)

Despite the fact that Fitzgerald knew that his load was not expected to be ready for another twelve hours, he did not sleep after speaking to Mr. McCloskey, according to Respondent. **See** Day 1, p. 239, l. 6-25 (Fitzgerald)

Around 5:00 P.M. Fitzgerald called in to Respondent's office and spoke to Ron Lavertu, the dispatcher. **See** Day 1, pp. 185-186 (Fitzgerald). Fitzgerald testified on direct examination that Lavertu told him his load would be ready around 10:00 p.m. – 11:00 p.m. **See** Day 1, p. 187, l. 12-17 (Fitzgerald). However, once again, under cross-examination, Fitzgerald admitted that Mr. Lavertu had, consistent with Mr. McCloskey, informed him that his load was not expected to be ready until at least midnight. **See** Day 1, p. 248, l. 20 – p. 249, l. 14 (Fitzgerald); **see also** Day 1, p. 97, l. 24-98, l. 2 (Lavertu) (Lavertu told Fitzgerald that load not expected to be ready until at least midnight); p. 124, l. 2-10 (Lavertu) (same).

According to the Respondent, despite knowing that his load was not going to be ready before midnight, and despite knowing of frequent production delays, Fitzgerald decided to report to work at 8:00 p.m. on the evening of January 2, 2002. **See** Day 1, p. 247, l. 16-23 (Fitzgerald).

Lavertu testified that, upon seeing Fitzgerald that early, and given the state of production at the time, he was "concerned" about Fitzgerald's preparedness; however, he assumed Fitzgerald was adequately prepared to do his job and did not confront him. **See** Day 1, p. 125, l. 16- p. 126, l. 6 (Lavertu).

Respondent posits that each reason given by Fitzgerald to justify his decision was unreasonable and contributed to Fitzgerald's being unprepared for work and that, given his knowledge of the type of load he would be driving, and the conversations he had previously had that day with both Mr. McCloskey and Mr. Lavertu, it was not reasonable for Fitzgerald to expect that his load would be ready any earlier than midnight, as he had been twice told. **See** Day 1, p. 249, l. 12-22 (Fitzgerald); Day 1, p. 123, l. 12-22; p. 124, l. 22-25 (Lavertu); Day 1, p. 68, l. 14-18 (Melvin);

Fitzgerald also testified that he hoped to get some sleep while waiting in the yard for his load to be ready. **See** Day 1, p. 248, l. 3-19 (Fitzgerald). However, under cross-examination,

Fitzgerald admitted that he had never before gotten any sleep at the Framingham facility. **See** Day 1, p. 196, l. 9-20 (Fitzgerald). Fitzgerald also admitted that he knew, prior to reporting for work, that there would be a good deal of traffic in the yard, preventing him from getting any sleep. **See** Day 1, p. 196, l. 21 – p. 197, l. 5 (Fitzgerald); **see** also Day 1, p. 201, l. 22 p. 202, 1-12 (Fitzgerald).

Given all this, Respondent posits that Fitzgerald could not reasonably have expected to have gotten any meaningful rest after reporting to the yard. Moreover, given that Fitzgerald lives 15 minutes from the Framingham yard, his decision to go the yard four hours early was unreasonable, according to Respondent's essential thesis.

Respondent states that there was conflicting testimony as to what Fitzgerald did while at the yard from 8:00 p.m. to 1:30 a.m. Compare Day 1, p. 126, l. 7-18 (Lavertu) with Day 1, p. 191, l. 23; p. 192, l. 2. (Fitzgerald). In any event, it is clear that at no time after he appeared at the Framingham facility did Fitzgerald get any sleep. **See** Day 1, p. 196, l. 10–11 (Fitzgerald).

Fitzgerald testified that he stayed in his cab, leaving his CB radio on to stay informed of the status of the load. **See** Day 1, p. 251, l. 7-20 (Fitzgerald). But **see** Day 1, p. 126, l. 23- p. 127, l. 5. (Lavertu). Fitzgerald admitted that the CB radio was often too noisy to allow for a person to get sleep, and that when sleeping on the road he turned it off. **See** Day 1, p. 251, l. 16-20 (Fitzgerald). Thus, as Fitzgerald's testimony is credited, this Court finds that his decision to leave the CB radio on while he attempted to get some rest was reasonable.

As was common following holidays, production of the Syracuse load was delayed and did not commence until approximately 1:45 a.m. **See** Day 1, p. 101, l. 16-18 (Lavertu); **see also** RX-24 (production sheet).

Around 2:00 a.m. on the morning of January 3, 2001 Fitzgerald told Lavertu that he was too tired to take the Syracuse load and he was going home. **See** Day 1, p. 198, l. 23-25 (Fitzgerald); **see also** Day 1, p. 134, l. 6-16 (Lavertu). Fitzgerald was not forced to take the load and was allowed to return home. **See** Day 1, p. 254, l. 23 – p. 255, l. 1 (Fitzgerald); **see also** Day 1, p. 134, l. 9-18 (Lavertu)

Respondent further submits that there was no evidence whatsoever that Respondent had ever forced a driver to take a load after claiming they were fatigued. To the contrary, Fitzgerald himself admitted that numerous other drivers had refused to take loads because they were fatigued, yet suffered no adverse employment action and, in fact, some had even been paid for the loads they did not take. **See** Day 1, pp. 263-265 (Fitzgerald); **see also** CX-8, 2nd ¶ ("I want to make it known that many drivers have refused to do trips due to waiting around all night for trailers to

be loaded and for being over tired. They have never been fired, and some have also been paid for the loads they refused to take out."); **see also** Day 1, p. 66, l. 6-17 (Melvin).

Ron Lavertu sent an E-mail to John Patten addressing a number of issues from the night's work which included a reference to the situation with Mr. Fitzgerald. **See** CX-13; **see also** Day 1, p. 144, l. 1-3; p. 145, l. 15 – p. 146, l. 7 (Lavertu). The E-mail, in reference to Fitzgerald, concludes with:

> I told him that if he didn't think he could do it to not do it. **I'm tired of arguing with this guy and listening to him complain about everything. Is there something we can do? Is he that valuable to us? I've always been a little wary of him but when he mentioned being under forced dispatch, etc...the red flags went up all over the place...** (Emphasis added)

See CX-13.

Lavertu was questioned at length concerning this E-mail. **See**, **e.g,**, Day 1, pp. 112-122; 133-136 (Lavertu). Lavertu admitted that Fitzgerald's refusal to drive was "frustrating" because Fitzgerald had not arrived for work adequately prepared and, from a customer-service perspective, Respondent would have an issue with the Syracuse customer. **See** Day 1, p. 118, l. 7-13. He was also frustrated at the delays in production. **Id**., p. 120, l. 15-17 (Lavertu). Lavertu admitted that he was also upset with Fitzgerald for implying that he was being asked to go out under forced dispatched. **See** Day 2, p. 120, l. 1-5 (Lavertu). Lavertu testified that his use of the work "complain" related solely to Fitzgerald's constant complaining about general work issues, such as rate of pay, production delays, and location of runs. **See** Day 2, p. 324, l. 25- p. 327, l. 7 (Lavertu). Mr. Lavertu explained:

> "No matter what we did he was never happy. You could change his run. You could take him out of the day cab and put him in a sleeper. That wasn't good enough. If he was doing a run to Buffalo, he wanted to go to Syracuse. If he was going to Syracuse, he wanted to go to Somerset. If he was going to Somerset, he wanted to go to Long Island. No matter what you did it never seemed to make a difference. The pay wasn't good enough. He wasn't getting home in time you know to have quality time at home when he was in the sleeper. It was just – no matter what we did, it was very, very frustrating from you know my standpoint." **See** Day 2, p. 326, l. 22 – p. 327, l. 7 (Lavertu); **see also Id**., p. 332, l. 18 – p. 333, l. 1 (Fitzgerald had constant "everyday gripes") (Lavertu).

Respondent submits that Lavertu testified consistently that Fitzgerald had never before complained to him about drug testing, "forced dispatch" or being asked to engage in any unsafe activity. **See** Day 1, p. 135, l. 8 – 19 (Lavertu); Day 2, p. 325, l. 6-17

(Lavertu). Rather Fitzgerald was more of a general "complainer" who, despite what was done to appease him, he would find something to complain about. **Id**. p. 141, l. 17-24 (Lavertu).

Respondent points out that Mr. Patten similarly testified that Fitzgerald had never before complained to him about alleged safety violations or unsafe conditions, characterizing Fitzgerald as more of a "general complainer." **See** Day 2, p. 435, l. 12-25; p. 436, l. 13-24; pp. 467-468 (Patten). Moreover, there is no evidence in the record, besides Fitzgerald's uncorroborated and wavering testimony, that prior to being terminated he had ever raised "safety" complaints to Mr. Lavertu or Mr. Patten.

In his interrogatory answers, Fitzgerald admitted that "he never had any communication with members of management, or any person considered to be his superior, at National Freight concerning complaint letters to be sent to management." **See** RX-4, Answer No. 9. I disagree with Respondents' position and as set forth at length below, this Court accepts and credits Complainant's version of pertinent events.

Lavertu also testified that, by sending the E-mail, he was essentially asking Mr. Patten if he could sit down with Fitzgerald and discuss the Respondent's reasonable expectations concerning drivers reporting for work prepared to deal with common situations, like production delays, testimony that I do not accept as it is unreasonable. **See** Day 1, p. 119, l. 5-8 (Lavertu).

On January 3, 2002 Fitzgerald slept until approximately 1:00 p.m., at which time he phoned in to Respondent's office and spoke to Mr. Patten. **See** Day 1, p. 206 (Fitzgerald) While there was contrasting testimony concerning the contents of this conversation, Respondent submits that, **at the commencement of the conversation**, there was no mention of any disciplinary action being taken against Fitzgerald. **See** Day 1, p. 255, l. 18-20 (Fitzgerald); Day 2, p. 430, l. 12- p. 432, l. 25 (Patten); cf. CX-9, p. 5 (Patten affidavit) ("I did not intend to terminate Fitzgerald when I got on the phone with him.").

According to Respondent, Fitzgerald's recollection of the conversation was not clear, but he did testify that the conversation was amicable and consisted essentially of small talk. **See** Day 1, pp. 206-208; p. 211, l. 4-10 (Fitzgerald). He testified that, for no apparent reason Mr. Patten ended the call by saying "Fitzi, I'm going to have to let you go." **Id**.

On the other hand, Patten testified that, while the conversation began amicably, once he offered some constructive criticism concerning being prepared for work, Fitzgerald "flew off the handle." **See** Day 2, pp. 430-432 (Patten). At that point in the conversation, Fitzgerald became hostile, cursing at Patten and telling him that he did not know what he was doing as a dispatcher and that he did not respect him as a manager. **See** Day 2, p. 432, l. 11-25 (Patten); **cf**. CX-6; CX-9, pp. 3-4. It was at that point,

after his authority had been challenged, and after Fitzgerald had told him he did not respect his ability to act as general manager and would no longer listen to Mr. Patten, Patten decided to terminate Fitzgerald for insubordination based on Fitzgerald's statements during the conversation. **See** Day 2, p. 434, l. 2-25 (Patten); p. 406, l. 13-14 (Johnson) ("He was terminated because he told Mr. Patten that Mr. Patten didn't know what the f--- he was doing."); p. 410, l. 2 – p. 411, l. 3 (Johnson).

Respondent posits that Patten's testimony at trial was entirely consistent with his recounting of the incident in an E-mail he sent to Anne Johnson on January 7, 2001, four (4) days after the termination. **See** CX-6; **see also** CX-9, pp. 3-4 (Patten affidavit to NLRB). This E-mail, which was sent prior to any complaints being filed by Fitzgerald, describes the conversation from Patten's perspective. **Id**. Under cross-examination, Patten was challenged about the legal ramifications of this E-mail. **See** generally Day 2, p. 437 - 477 (Patten).

Fitzgerald acknowledged that if he had made the statements attributed to him by Patten, it would have been disrespectful and inappropriate. **See** Day 1, pp. 259-261 (Fitzgerald)

Complainant proceeded to trial claiming two (2) forms of "protected activity" caused his termination. First, he claimed that he was fired for refusing to drive a load in the early morning hours of January 3, 2001. Second, he claimed that he was fired due to statements he had made concerning the manner in which Respondent was conducting its Drug Testing Policy. Complainant failed to establish that either circumstance was a "protected activity," or played any role in his termination, according to the Respondent.

Additionally, during trial a third claim was raised, that Complainant was fired due to his engaging in a "letter writing" or "information gathering" campaign. Again, Complainant's proof on this claim falls for short of carrying his burden. (I disagree as Complainant clearly raised this issue in his pre-hearing report and he has provided substantial evidence in support thereof, as is further discussed below.)

Respondent further posits that Fitzgerald's refusal to drive was not "protected activity" as he had ample time to rest prior to reporting for work, yet failed to do so because he had at least seven days off prior to being scheduled for work on January 2, 2001. Despite his initial testimony to the contrary, he was aware, at least by noon on January 2, 2001 that his load would not be ready until midnight. He had already been awake for five (5) hours, and despite knowing that his load was not expected to be ready for an additional twelve hours, according to Respondent, Fitzgerald never slept during the day.

Fitzgerald was also aware that he would be hauling to Syracuse a "D-cap" load, which was a special production run and the sort that was often delayed. Fitzgerald also knew that it was difficult

to sleep in the Framingham yard due to the high level of activity. He had never before been able to get any sleep at the yard, according to Respondent.

Respondent further posits that, despite all of this, Fitzgerald elected to report for work at 8:00 p.m., four (4) hours prior to the time at which he could have reasonably expected that his load may be ready.

Moreover, according to Respondent, Fitzgerald failed to prove that any comments he may have made concerning Respondent's Drug testing Policy played any role in his termination. However, I disagree because as noted above, in the Fall of 2000 Fitzgerald was subjected to three "computer-selected, random drug tests" within a several week period. Fitzgerald claimed that during this time he called the Vineland, New Jersey headquarters of the company and spoke to a woman named "Linda" who was in charge of drug testing **See** Day 1, p. 173, l. 3 – p. 174, l. 25 (Fitzgerald) He also claimed that, when he informed Patten that he had spoken to Linda, Patten became upset and said that he was now in a world of trouble with headquarters. **Id**., p. 175, l. 3-24.

Patten, however, testified that he never had a conversation with headquarters in which Fitzgerald's drug testing was discussed. **See** Day 2, p. 428, l. 5-18 (Patten)

Moreover, according to Respondent, Anne Johnson, Director of Human Resources, testified that there was no person by the name of Linda employed in the Vineland headquarters at the time in question. **See** Day 2, p. 352, l. 5-20; p. 382 (Johnson) She also testified that if headquarters had any problems with a manager over the administration of drug tests, she would have been aware of it. **Id**. p. 351, l. 13 – p. 352, l. 4 (Johnson).

In light of all of the evidence, given the credibility for Fitzgerald's testimony and taking into account the fact that such conversation did occur and while it took place several weeks prior to the termination, this Court finds that the "drug testing" issue played a part in Patten's decision to terminate Fitzgerald, as part of his "constant complaining."

The "information gathering" or "letter writing" campaign that Mr. Fitzgerald claimed to be engaged in, even if considered by the Court, played no role in Mr. Fitzgerald's termination. However, I disagree because there is sufficient evidence from which to conclude that Mr. Fitzgerald had, in fact, engaged in an "information gathering" campaign

Mr. Fitzgerald claimed that prior to his termination, he was engaged in an information-gathering campaign among the drivers designed to collect a list of complaints and present them to management. There is no evidence in the record, besides the post-termination statements of Mr. Fitzgerald that supports this contention, according to Respondent.

Mr. Fitzgerald had the opportunity at trial to present corroborating third-party evidence to support his claims, yet failed to do so. In particular, the Court notes that in one of his affidavits submitted to the NLRB, Mr. Fitzgerald claimed that John Melvin, another driver, was aware of, and had participated in, this information gathering campaign. **See** CX-22, p. 4.

Mr. Melvin was called as a witness at the trial of this case by counsel for Mr. Fitzgerald. **See** generally Day 1, pp. 38-69 (Melvin). At no time during Mr. Melvin's testimony did he provide any corroboration of, support for, or even acknowledgement of, any such "information gathering" campaign, according to the Respondent. **Id**.

As this Court credits Fitzgerald's testimony concerning the "information gathering" campaign, Fitzgerald did carry his burden of proving that at least John Patten, knew of his claimed activities.

In discovery, Fitzgerald admitted that "he never had any communication with members of management, or any person considered to be his superior, at National Freight concerning complaint letters to be sent to management." **See** RX-4, Answer No. 9. Mr. Fitzgerald also admitted during his testimony that he has "no idea" what management knew about his purported activities and that he had "no basis" for testifying that management was, in fact, aware. **See** Day 2, p. 504, l. 1-15 (Fitzgerald).

Respondent points to three witnesses on its behalf who testified that they were unaware of any such "information gathering" or "letter writing" campaign until well after January 3, 2001. **See** Day 2, p. 435, l. 9-18 (Patten); p. 362, l. 9-25 (Johnson); p. 324, l. 18- p.325, l. 17 (Lavertu); **see also** CX-9, p. 6 (Patten affidavit).

Respondent posits that the only evidence in the record concerning management's purported "knowledge" of the "information gathering" campaign consists solely of Fitzgerald's unsubstantiated "suspicions" that management knew because Mel MacDonald, a woman who worked in the office of the Framingham facility, was "eyeing" him at the company Christmas party. **See** Day 2, p. 495, l. 21 – p. 496, l. 9; p. 504, l. 16-23 (Fitzgerald). However, she was never closer than "one or two tables away" from Fitzgerald during the party. **Id**., p. 496, l. 5-9 (Fitzgerald); **ef. Id**., pp. 456-459 (Patten) (Patten saw Fitzgerald at the party, but never heard him or anyone else mention an information gathering campaign).

Within a day or so of his termination Fitzgerald had a telephone conversation with Ms. Johnson and a Vice-President from Respondent to discuss his termination. **See** Day 1, p. 231, l. 19 – p. 232, l. 18 (Fitzgerald); Day 2, p. 355-356 (Johnson). While the "information gathering" or "letter writing" campaign may not have been raised during this telephone call, I find and conclude that

this was the third reason for his termination, along with the fact that he was a “chronic complainer.”

Additionally, Ms. Johnson testified that, in responding to the complaint that Fitzgerald had filed with the National Labor Relations Board, she conducted a full and thorough investigation at the Framingham facility, interviewing both drivers and management. **See** Day 2, pp. 357-362 (Johnson); **ef**. Day 2, p. 344, l. 3-22 (Johnson) (discussing open door policy and frequent phone calls with drivers). However, the fact remains that this was an in-house investigation and could be described as a so-called “whitewash.”

However, as at least Patten was aware, it is clear from the record that Respondent was adverse to the Complainant collecting information relating to driver concerns and presenting them to management, especially as management viewed him as a “chronic complainer.”

There was undisputed testimony that another employee of Respondent, Al Laffen, had previously engaged in a “letter writing” or “information gathering” campaign which, in fact, resulted in driver concerns being presented to management. **See** Day 2 p. 486, l. 22 – p. 487, l. 10; p. 502, l. 1-23 (Fitzgerald). It is also undisputed that Mr. Laffen remains employed by Respondent and that no adverse action was ever taken against Mr. Laffen as a result of his coordinating the “letter writing” or “information gathering” campaign, apparently because he is not “a chronic complainer” or a troublemaker. **Id**. p. 502, l. 15- p.503, l. 3-6 (Fitzgerald).

Based on this record, as further discussed below, this Court finds and concludes that, Complainant proved that he was engaged in an “information gathering” campaign and as Complainant proved that management was aware of his activities, there is evidence in the record from which an inference could be drawn that Respondent also used that campaign as a basis for terminating Complainant, and I so find and conclude.

Following his termination, Mr. Fitzgerald submitted complaints to the National Labor Relations Board, the Attorney General for the Commonwealth of Massachusetts, the Federal Department of Transportation, the Occupational, Safety and Health Administration and various News outlets. **See, e.g.**, RX-6; RX-7; RX-8; RX-9; RX-10; RX-11; RX-13; RX-14; RX-15. None of these complaints resulted in any disciplinary actions against Respondent. However, this is immaterial herein. What counts is this **de novo** hearing.

Fitzgerald sent a 3-page letter to the DOT detailing what he claimed to be “major” safety violations and portraying Respondent as an employer who is unconcerned with driver safety. **See** RX-8; **ef**. Day 2, p. 341, l. 6-24 (Johnson) (Respondent driver turnover rate of 23-38% well below industry average of 98%). In his DOT Complaint, Fitzgerald stated that the “real reason” he had been fired related to the “information gathering” campaign, not the refusal to drive or the drug testing. **Id**.

However, the DOT investigated all of his claims and gave Respondent a "Satisfactory" rating. **See** RX-1; Day 2, p. 353, l. 24 – p. 354, l. 3 (Johnson) (Respondent has never been fired or reprimanded by state or federal agency for "unsafe conditions"). When informed of this decision, Fitzgerald indicated he was not satisfied and insisted upon additional inquiry. **See** Day 1, p. 276, l. 3-7 (Fitzgerald) Again this is entirely irrelevant in this context.

In the context of his contacts with the DOT, Fitzgerald had a conversation with a representative from the DOT in which he was asked if he was on a personal vendetta against the Respondent. **See** Day 1, p. 276, l. 6 – p. 277-11 (Fitzgerald). In response, Fitzgerald contacted the DOT headquarters in Washington, D.C. seeking to file charges against the individual who had asked him that question, **Id**., a question which, in my judgment, is improper and intimidating. What counts are the truth or falsity of the charges made, not one's motivation in raising those charges.

Although he initially denied doing so, Fitzgerald also contacted Senator Kennedy's office in an attempt to report this DOT employee and generally complain about Respondent. **See** Day 1, p. 277, l. 12 – p. 279, l. 9; **see also** RX-13. Similarly, while he also initially denied asking other drivers to contact their senators and representatives, after being shown his own letter, Fitzgerald admitted to soliciting the drivers to make such contacts. **See** Day 1, p. 279, l. 10 – p. 280, l. 13 (Fitzgerald). However, I disagree with the Respondent because contacting one's senator or representative is, in my judgment, entirely proper, especially when one's complaints to federal and state agencies produce no results.

Fitzgerald did not take sufficient steps to mitigate any potential damages, according to Respondent, who points out that Fitzgerald was terminated on January 3, 2001. **See** JX-1, ¶ 4. He did not begin working again for a period of nine (9) months. **See**, **e.g.**, RX-4, p.14. The evidence demonstrates that Fitzgerald did not take sufficient, prompt steps to secure replacement employment and, thus, is not entitled to any damages. To the extant that this Court elects to overlook Fitzgerald's failure to mitigate, any damage award must be reduced to account for Complainant's inactions.

Moreover, according to Respondent, Fitzgerald is entitled to no damages as he did not promptly seek replacement employment and, had he done so, he would have found adequate, comparable work. Fitzgerald credibly testified on direct examination that he began his job search within 1-2 weeks of his termination. **See** Day 1, pp. 226-227; p. 281, l. 12-20 (Fitzgerald); but **see** RX-4, Interrogatory Response 11 (claims to have started looking for work the "next day"). He also indicated that his son would be able to verify that. **Id**., p. 227, l. 13-17 (Fitzgerald). However, as was the case with Mr. Melvin, Fitzgerald's son was a witness at trial and offered no such testimony. **See** generally, Day 1, pp. 70-76

(Fitzgerald, Jr.). To the contrary, the evidence in the record contradicts Fitzgerald's testimony and demonstrates that, had he taken reasonable and prompt action, he could have secured employment, at a comparable rate of pay, much sooner than he did, according to Respondent.

The earliest documentary evidence that in any way supports Fitzgerald's testimony concerning his post-termination efforts to find another job is a single letter dated June 25, 2001. **See** RX-17. Given Fitzgerald's overall credibility, this Court finds that he did take proper steps to find another job. **See**, **e.g.**,, RX-17 and RX- 20 (only other documented evidence of a job search is December 2001/January 2002); **cf.** RX-18 and RX-20. The record reflects that Fitzgerald did not actually begin working again until September of 2001, when he was hired by Boston Coach. **See** RX-4, Interrogatory Answer No. 11.

I disagree with the Respondent on this issue and, as he took adequate and reasonable steps to mitigate his damages, Fitzgerald is entitled to damages, and these will be specified below.

According to the Respondent, if the Court were inclined to award Complainant some damages, it is clear that the evidence does not warrant a large damage award. Contrary to his testimony, the evidence reveals that Fitzgerald sent a resume to Coach USA only after Respondent's counsel served the subpoenas. **See** RX-19 (handwritten notations). On or about April 14, 2002, within one (1) month of sending the resume to Coach USA, Fitzgerald became employed by Coach USA at a rate of pay that is comparable to that which he was earning while employed at Respondent. **Compare** JX-1, ¶ 5 with CX-10.

Thus, according to the Respondent, the only period of time for which Fitzgerald is entitled to seek damages runs from June 25, 2001 to April 14, 2002, a period of 42 weeks.

Respondent posits that given an average weekly wage of $1,189.73, and giving him full credit for the maximum 42 week period, at most Fitzgerald is entitled to $32,662.56 in damages (42 weeks of lost wages minus $17,306 earned at Boston Coach). **Cf**. CX-11, pp. 1-2 (Boston Coach wage information).

However, even this sum must be viewed in light of the conclusion that even after June 25, 2001, Fitzgerald did not take adequate steps to secure replacement employment. Given all of the evidence before the Court, and taking into account (a) Fitzgerald's lack of prompt action in seeking replacement employment, (b) his securing of comparable employment shortly after Respondent's subpoena, and (c) his overall lack of credibility on issues relating to mitigation, Respondent requests that this Court reduce Fitzgerald's damages by 50%.

In its reply brief, the Respondent submits that Complainant has not even attempted to address the repeated occasions on which

he materially changed his testimony throughout this case. Indeed, his proposed statement of facts reads very much like his initial testimony sounded. The numerous clarifications, modifications and outright changes of testimony that permeated his cross-examination testimony are ignored. Given the critical importance that witness credibility must play in determining the outcome of this case, such a flaw is fatal and simply serves to confirm the fact that Complainant's uncorroborated testimony is wholly unreliable.

Moreover, Fitzgerald devotes a mere one (1) page of text to the circumstances surrounding his insubordination, which directly lead to his termination. **See** Complainant's Post-Trial Brief, pp. 11-12. Even this discussion consists of little more than Complainant's version of the story. John Patten's trial testimony concerning the nature and content of the discussion he had with Complainant was unchallenged on cross-examination. Moreover, it fully comported with the near-contemporaneous e-mail that Patten had sent to Human Resources less than a week after the termination. **See** CX-6. Given Complainant's overall lack of credibility, it is not surprising that he attempts to divert this Court's attention away from his insubordination. However, those actions and statements lie at the heart of this case and cannot be ignored, according to Respondent.

Finally, two points of clarification are necessary concerning Complainant's wage information. First, Complainant overstated his wage history by approximately $5,000, resulting in a nearly $100/week overstatement. It is not disputed that at some point in time Complainant's job responsibilities and pay changed, although, there was no clear testimony as to when such change occurred. A review of Complainant's wage history reveals a gap of pay from 12/31/99 through 3/3/00. See CX-l0, p. 4. There is also a notation of "Hours Only" from 4/21/00 through 12/29/00. **Id**., pp. 6-13. It is reasonable to conclude that one of these two dates is the time at which Complainant changed job responsibilities.[7]

As set forth in the chart attached as Exhibit A, for the 44-week period from March 3, 2000 through December 29, 2000, Complainant earned a total of $52,348.50, or $1,189.74/week. For the 37-week period from April 21, 2000 through December 29, 2000, Complainant earned a total of $45,506.50, or $1,229.91/week.[8]

Complainant, without stating that he was doing so, apparently

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[7]This "gap" should have been clarified by the Respondent's payroll and wage information. As Respondent has not done so, I have resolved this issue in Complainant's favor.

[8]Respondent contends that it is more reasonable to begin the wage analysis as of April 21, 2000, the first week during which Complainant was paid for "HOURS ONLY." **See** CX- 10. However, even if the Court were to reach back one more week to April 14, 2000 as suggested by Complainant, the total earned would still only be $46,799.50, not the more than $50,000 claimed by Complainant.

added his post-termination "cash-out" of accrued vacation time to his "wages." **See** CX-10, pp. 13-15 (showing 4 post-termination payroll entries). Including these items, which are not "wages" earned during the preceding period of employment, is improper.[9]

Second, under almost any wage calculation, Complainant has been earning more with Coach USA than he was at Respondent. The evidence shows that Complainant was still working for Boston Coach as of after April 14, 2002. **See** CX-l 1, p. 2 (paycheck evidencing that Complainant was still working for Boston Coach as of April 14, 2002). Complainant testified that there was "a couple of weeks" between leaving Boston Coach and commencing work for Coach USA. See Day 1, p. 223 (Fitzgerald). Complainant's payroll records show that through June 14, 2002, Complainant had earned $9,506.40 from Boston Coach. See CX-11, p. 4. Given Complainant's testimony, it is reasonable to assume that this covers a six (6) week period of time. That equates to $1,584.40 per week.[10]

Given all of the foregoing, Respondent moves for judgment in its favor and a dismissal of the Complaint.

IV FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. DISCUSSION OF LEGAL PRINCIPLES

STAA Section 405(b) provides:

> No person shall discharge, discipline or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health...

49 U.S.C. § 2305(b). Department of Transportation regulations provide that

> [n]o driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver′s ability or alertness is so impaired or so likely to become impaired, through fatigue, illness, or any other cause as to make it unsafe for him to begin or continue to operate the motor vehicle.

49 C.F.R. § 392. Here, Complainant clearly engaged in protected

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[9]I disagree as Complainant was entitled to these accrued benefits.

[10]As discussed below, Respondent is entitled to a credit for all of the Complainant's post-termination wages until he is reinstated by the Respondent to his former job.

activity when he refused to operate a motor vehicle during a period of impairment due to fatigue. Respondent insisted several times that Complainant accept the assignment in violation of the law and implementing regulations.

It is well-settled that protection under the "when" clause of STAA Section 405(b) requires only that an employee refuse to operate a vehicle when operation would violate Federal safety rules, regulations, standards, or orders. Protection under the separate "because" clause is conditioned on the criteria contained in that clause and in the second and third sentences of Section 405(b). **Duff Truck Line, Inc. v. Brock**, No. 87-3324 (6th Cir. 1988) (LEXIS, Genfed library, Court of Appeals file), **aff'g Robinson v. Duff Truck Line, Inc.**, Case No. 86-STA-3, Sec. Final Dec. and Order issued March 6, 1987.

The rationale is that public policy is best served if unlawful discrimination is challenged "within the context of existing employment relationships" where possible. **Clark v. Marsh**, 665 F.2d 1168, 1173 (D.C. Cir. 1981), **citing Bourque v. Powell Electrical Mfg. Co.**, 617 F.2d 61, 65 (5th Cir. 1980).

Complainant does seek reinstatement. Because Complainant was discharged, he is entitled to recover back pay with interest, compensatory damages, and costs and expenses reasonably incurred by Complainant in the bringing of this complaint, and these will be further discussed below. 49 U.S.C. app. § 2305(c)(2)(B); 29 C.F.R. § 1978.109(a); **Hufstetler v. Roadway Express, Inc.**, No. 85-STA-8, Sec. Final Dec. and Order, August 21, 1986, slip op. at 56-57, **aff'd sub nom. Roadway Exp., Inc. v. Brock**, 830 F.2d 179 (11th Cir. 1987). The back pay award shall comprise Complainant's reasonably projected compensation had he remained employed by Respondent less any compensation received as the result of substitute interim employment. The period for computing back pay shall run from the date of the illegal termination to the date that Complainant gained comparable employment with Boston Coach. **See Nelson v. Walker Freight Lines, Inc. dba Package Express**, No. 87-STA-24, Sec. Dec. and Order of Remand, January 15, 1988, slip op. at 6 n.3.

The "because clause of § 405(b) prohibits employer retaliation for refusal to drive "because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of [his or her] equipment." The plain language of the "because" clause indicates that its purposes include protection of employees who refuse to operate equipment they reasonably believe to be unsafe.

In his remarks on the Senate floor discussing Title IV of the STAA, Senator Danforth stated: "I believe the employee protection provisions are vital to insure that employees will not be harassed for not being willing to perpetuate safety violations." (128 Cong. Rec. S.32510, 12/19/82). The Senate Committee Summary of Title IV of the STAA explained that .[t]hese provisions aim to promote highway safety, encourage safe operation and maintenance of

commercial motor vehicles, and protect the health and safety of commercial motor vehicle operators." **Id**. This general goal was explicitly acknowledged by the Secretary in **Davis v. Hill. Inc.**, 86-STA-18, Final D & 0 issued 3/19/87: "The purpose of the STAA is to promote safety on the highways." (Slip op. at 3). (**See also Brock v. Roadway Express, Inc**., 481 U.S. 252, 258, 107 S.Ct. 740, 1745—1746, 95 L.Ed.2d 239 (1986); 128 Cong. Reo. S. 32698, 12/20/82).

The narrow reading of the Act advocated by Respondent, which would limit the scope of the "because" clause to the protection of drivers who refuse to operate equipment, that is in unsafe physical condition, conflicts with the Secretary's broad construction of the safety goals of the STAA in Davis. Such a narrow reading would frustrate the clear, Congressional intent of promoting safety. Moreover, Respondent's interpretation was explicitly rejected in **Self v. Carolina Freight Carriers Corp.**, 89-STA—9, Final D & 0 issued 1712/90. In **Self** the Secretary held that under the "because" clause of § 405(b) of the STAA,

> the "unsafe condition of [the] equipment", giving rise to an employee's reasonable apprehension, includes conditions which make operation of a commercial motor vehicle on the road a safety hazard, **e.g.**, inclement weather conditions, an improperly balanced load. **The physical condition of a driver that could affect safe operation of the equipment would also come within this classification.** (Slip op. at 9; Emphasis added; Citations omitted).

Thus § 405(b) protects a driver who refuses to drive because of his or her "reasonable apprehension of serious injury to himself or the public due to the unsafe condition of [his/her) equipment" when the unsafe condition is due to the physical condition of the driver. **This of necessity includes an apprehension of harm due to the fatigue of a co-driver or an illegal dispatch.** (Emphasis added)

The standard specified in the Act for the application of the "because" clause of § 405(b) is as follows:

> The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

The rationale of **Pensyl v. Catalytic, Inc**., 83-ERA-2, Final D & 0 issued 1/13/84, a case decided under the whistleblower provisions of the Energy Reorganization Act of 1974 (hereinafter "ERA") applies to implementation of the "because" clause. In that

case the Secretary held:

> **A worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful.** Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience. (Slip op. at 6-7) (Emphasis added)

B. COMPLAINANT'S CREDIBILITY

Respondent submits that Complainant was not a credible witness and that this complaint should be denied.

I disagree. I observed Complainant's demeanor in the court room and as he, knowing the pains and penalties for perjured testimony, testified in the witness box under the oath I administered to him. In my judgment, Fitzgerald is a credible witness whose testimony withstood intense cross-examination by Respondent's counsel. The "various versions" of key events cited by Respondent are simply due to the occurrence of some heated discussions, the passage of time and Fitzgerald's failure, unlike some other truck drivers over whose STAA complaints I have presided, to keep a daily log of key events, as to who said what and to whom, etc., apparently because he did not expect his situation to result in this litigation. However, Complainant's failure to record events contemporaneously is more than offset by CX-13, a document which, in my judgment, is the most important piece of evidence in this case, and this exhibit will be more fully discussed below.

In summary, Complainant testified most credibly before me and I have credited his testimony in resolving disputed versions of events.

C. COMPLAINANT HAS ESTABLISHED A PRIMA FACIE CASE.

At the hearing, Respondents moved for a summary judgment claiming that Complainant failed to prove a **prima facie** case under the Surface Transportation Assistance Act, 49 U.S.C. § 31105. (TR 317). I denied the motion and ruled that Fitzgerald had proven a **prima facie** case under the STAA. (TR 321-323).

The elements of a violation of the employee protection provisions of the Surface Transportation Assistance Act are that "the employee engaged in a protected activity, that the employee was subjected to adverse employment action, and that there was a causal connection between the protected activity between the protected activity and the adverse action." **Clean Harbors Environmental Services, Inc. v. Herman**, 146 F.3d 12, 21 (1st Cir. 1998). As pertinent here the Act states as follows:

(a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against any employee regarding pay,

terms, or privileges of employment, because ...

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or (B) the employees refuses to operate a vehicle because, (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health . . . or (ii) because of the employee's reasonable apprehension of serious injury to himself or the public because the unsafe condition of such equipment. 49 U.S.C. § 31105.

Under 49 U. S. C. § 31105 (a)(1)(A) an employee engages in protected activity when he "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation . . . " Internal complaints are protected and need only be "related to" a violation of a commercial motor vehicle safety regulation. **Moravec v. HC & M Transportation, Inc.**, 1990-STA-44 (Sec'y July 11, 1991).

On the basis of the totality of this closed record, I find and conclude that Fitzgerald engaged in protected activity when he complained to Patten about the method of recording on his daily official log his waiting time.

The Federal Hours-of-Service Regulations are set forth at 49 C.F.R. Part 395. Complainant was required to prepare a daily record of duty status, or daily log. 49 C.F.R. § 395.8. Complainant's signature on his daily log certifies the correctness of the entries on his log. 49 C.F.R. § 395.8 (f)(7).

49 C.F.R. § 395.2 contains a series of definitions applicable to the Hours-of-Service Regulations. As pertinent here, the definition of on duty time states:

> On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. On duty time shall include: ....(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth.

Complainant credibly testified that he had several discussions with Patten about how drivers should record their time waiting at the Poland Springs facility in Framingham, MA. Patten and Melvin confirmed that at least one such discussion took place. Patten and Fitzgerald clearly disagreed about how waiting time should be recorded. Patten contended that the waiting time should be recorded as "off duty" time on the driver's daily logs. Complainant disagreed with Patten and contended that this time should be recorded as "on duty (not driving)" on the driver's daily logs. Federal regulations state that on-duty time includes "(1) All time at a plant, terminal, facility, or other property...waiting to be dispatched, unless the driver has been relieved from duty by the

motor carrier;" 49 C.F.R. § 395.2.

There can be no serious dispute that 49 U.S.C. § 31105(a)(1) protects complaints "related to" violations of provisions of the federal motor carrier safety regulations. It is well-settled that complaints "related to" violations of the federal hours-of-service regulations are protected under the STAA. **Bettner v. Daymark Foods, Inc.**, 1997-STA- 23 (ALJ Jansen May 13, 1998); **Brown v. Besco Steel Supply**, 1993-STA-30 (Sec'y Jan. 45, 1995). Complainant's complaints about how waiting time should be recorded on daily logs is clearly a complaint "related to" violations of 49 C.F.R. § 395.2 and 49 C.F.R. § 395.8 which relates to the former and manner of maintaining a record of duty status, and I so find and conclude.

49 C.F.R. § 395.8 requires a commercial driver to have in his possession a log current to the last change of duty status. Logs are intended to reflect accurately a driver's activities. 49 C.F.R. § 395.8 (k) requires a driver to have "the immediately preceding 7 days" logs in his possession while on duty. Driving is on duty time. 49 C.F.R. § 395.2. Thus, a driver who drives with a falsified record of duty status does not have a log current to the last change of duty status and would clearly be driving in violation of 49 C.F.R. § 395.8.

Complainant's statements to Patten concerning the recording of waiting time were also "related to" violations of 49 C.F.R. § 395.3. That regulation states in pertinent part as follows:

> (a) Except as provided in §§ 395.1 (b)(1), 395.1 (f) and 395.1(I), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive: (1) More than 10 hours following 8 consecutive hours off duty; or (2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.
>
> (b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after . . . .(2) Having been on-duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

Patten testified that his discussions with Patten involved not only how to record waiting time on his daily log but also application of the "15-hour rule" set forth in 49 C.F.R. § 395.3. (TR 425; TR 465-466). Thus, Complainant's statements to Patten that he should record his waiting time as "on duty (not driving)" time on his record of duty status were "related to" violations of 49 C.F.R. § 395.3, and I so find and conclude.

NFI contends that Complainant's position regarding recordation

of waiting time is an incorrect interpretation of 49 C.F.R. §395.2. Even if this were true, which it is not, Complainant's statements are still protected under the STAA. A complaint need only be "related to" a violation of a federal motor carrier safety regulation to be protected under the STAA. Even if a complaint is later found to be unfounded, it is still protected under the STAA, as long as the whistle blower's beliefs are reasonable, and I find and conclude that they are reasonable. **Harrison v. Roadway Express, Inc.**, 1999-STA-37 @ 10 (ALJ Kaplan March 30, 2000) **citing Yellow Freight Systems, Inc. v. Martin**, 954 F.2d 353, 356 (6th Cir. 1992).

1. Fitzgerald engaged in protected activity when he complained to John Patten about being subjected to repeated drug and alcohol testing.

The United States Department of Transportation has set forth a comprehensive scheme for the testing of commercial truck drivers for certain drugs and alcohol. 49 C.F.R. Part 382. Federal Regulations require that motor carriers such as NFI randomly test their drivers for certain drugs and alcohol. 49 C.F.R. § 382.305. The regulations prohibit an employer from providing advance notice of the random drug and alcohol test to employees. 49 C.F.R. §382.305(l).

Complainant was subjected to "random" drug and alcohol testing on November 20, November 23, and December 23, 2000. (TR 392). Complainant testified that he was also given advance notice of at least one test. Complainant complained to NFI's home office about being subjected to multiple tests. It is undisputed that Complainant also complained to Patten about having been subjected to multiple drug and alcohol tests in a short period of time.

Anne Johnson testified about NFI's drug and alcohol testing policies. Ms. Johnson testified that drivers are picked randomly for drug and alcohol testing and that it is possible that a driver could be selected for testing several months in a row. This is irrelevant. Complainant made complaints both to NFI's home office and to John Patten about the drug testing policy. These complaints were "related to" violations of 49 C.F.R. §§ 382.305. It is immaterial whether or not there was an actual violation of federal drug and alcohol testing regulations. Complainant's complaints are still protected.

2. Complainant engaged in protected activity in his information gathering and letter writing campaign.

Complainant testified credibly and extensively regarding his attempt to gather information for purposes of a letter writing campaign to NFI's senior management officials. The information that Complainant gathered related to various safety issues including drivers' impairment due to fatigue caused by excessive time waiting for loads at the Framingham facility. Thus the information gathering and letter writing campaign was "related to" violations

of 49 C.F.R. § 392.3. In addition, Complainant gathered, or attempted to gather information about equipment and truck safety. Thus, his information gathering and letter writing campaign "related to" violations of the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 390, et seq., and I so find and conclude.

Both the Secretary and the Administrative Review Board have held that the gathering of information used to support protected safety complaints is itself protected under whistleblower cases adjudicated by the United States Department of Labor. **Michaud v. BSP Transport**, 1995-STA-29 (ARB Jan. 6, 1997), **citing Mosbaugh v. Georgia Power Co**., 1991-ERA-1 and 11, slip op. at 9 and n. 4 (Sec'y Aug. 5, 1992) (photographing of oil spill); **Haney v. North American Car Corp**., 1981-SDW-1, slip. op. at 4 (Sec'y June 30, 1982)(tape recording). To the extent that Complainant counseled other drivers to provide him with information relating to violations of the Federal Motor Carrier Safety Regulations, his activities are also protected. **Smith v. Yellow Freight System, Inc.**, 1991-STA-45 (Sec'y March 30, 1993) slip op. at 13.

3. Fitzgerald engaged in protected activity when he refused to drive on January 3, 2001.

49 C.F.R. § 392.3 provides in pertinent part as follows:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, **while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue**, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate. . . . [emphasis supplied]. (Emphasis added)

It is well-settled that a refusal to drive in violation of 49 C.F.R. § 392.3 is protected activity. **Polger v. Florida Stage Lines**, 1994-STA-46 @ 3 (Sec'y Apr. 18, 1995) **aff'd sub nom**. **Florida Stage Lines v. Reich**, 100 F.3d 969, 1996 U.S. App. Lexis 28353 (11th Cir. 1996); **Johnson v. Roadway Express, Inc.**, 1999-STA-5 (ARB Mar. 30, 2000).

The evidence clearly shows that Fitzgerald was already very sleepy when he refused to drive to Syracuse, NY at 2:00 a.m. January 3, 2001. NFI does not dispute that Fitzgerald was so tired, or so likely to become impaired due to fatigue had he taken the shipment to Syracuse, NY on the morning of January 3, 2001, and the fact that Fitzgerald's supervisor, a much younger man, could have safely taken that trip is completely irrelevant, and I so find and conclude.

As noted above, Respondent contends that Complainant's work refusal at 2:00 a.m. January 3, 2001 was not protected because Complainant did not report to work well rested. To be sure, "the

STAA does not protect drivers who deliberately make themselves unavailable for work by not taking advantage of their time off to rest. **Eash v. Roadway Express, Inc.**, 1998-STA-28 (ALJ May 11, 2000). **See also Eash v. Roadway Express, Inc.,** 1998-STA-28 (ARB October 29, 1999).

Complainant became sleepy through no fault of his own. When he went to bed on the evening of January 1, 2001, he only knew that he would have to report to work the next evening. Based on his past experience, it was reasonable for him to believe when he went to bed on the evening of January 1, 2001, that he would depart Framingham between 8:00 p.m. and 9:00 p.m. the next evening. This would have left him at least 13 hours to make the five-hour drive to Syracuse, NY the next evening and would have allowed him plenty of time to sleep if he became sleepy while en route. When Complainant awoke on January 2, 2001, he had no reason to believe that he would depart Framingham at 2:45 a.m. the next morning. Instead, it was still reasonable for him to believe that he would depart at 9:00 p.m. that evening, or possibly even earlier given that loads frequently departed early.

Complainant did not know that he might depart as late at midnight January 3, 2001, until he spoke with McCloskey on the afternoon of January 2, 2001. Even then McCloskey was not sure when Complainant's dispatch would be ready. Complainant acted properly in attempting to sleep on the afternoon of January 2, 2001, and I so find and conclude. Unfortunately, he could not fall asleep.

It was not until 5:00 p.m. on January 2, 2001 that Complainant knew that the load to Syracuse, NY would not be ready until midnight. Complainant again acted reasonably and tried to sleep. He reported for work well rested at 8:00 p.m. January 2, 2001. He attempted to sleep in the sleeper berth of his assigned truck while he waited for his load. Complainant could have reasonably expected to depart Framingham, MA no later than midnight January 3, 2001. Instead, NFI encountered numerous delays not of Complainant's making which pushed his departure time back further and further. Ultimately, the shipment was not completely loaded until 2:30 a.m. The earliest Complainant could have expected to depart Framingham, MA was 2:45 a.m. January 3, 2001, and I so find and conclude.

Instead of a midnight departure, Complainant refused that dispatch at about 2:00 a.m. Had he not refused, and instead left Framingham, MA at 2:45 a.m., he would have had little time to stop and rest if he became sleepy. (TR 92-93). Moreover, Complainant was already sleepy at 2:00 a.m. when he refused to take the shipment to Syracuse. He was looking at his condition worsening the longer he stayed awake. Moreover, Complainant testified that he tends to become sleepy between 2:00 a.m. and 5:00 a.m. (TR 195).

That Complainant would have found it difficult to sleep during the day is supported by scientific research described in a decision of the Federal Motor Carrier Safety Administration ("FMCSA").

After years of research, the FMCSA has proposed an overhaul of its hours of service regulations. In a Notice of Proposed Rulemaking ("NPRM") issued on May 2, 2000, the FMCSA acknowledged that the present rules are antiquated, stating:

> "The results of scientific research into fatigue causation, sleep, circadian rhythms, night work and other matters were unavailable decades ago when the HOS [hours of service] rules were formulated. . . . The FMCSA believes that the revised HOS rules proposed today will reduce the acute and cumulative fatigue which appears to beset many drivers. . . . " 65 C.F.R. 25541.

The NPRM reviewed in great detail the scientific literature and studies concerning truck drivers and fatigue. The FMCSA acknowledged that scientific studies indicate that fatigue comes from a variety of causes:

> As O'Neill and his co-authors of "Understanding Fatigue and Alert Driving," a training course developed by the ATA [American Trucking Associations] in partnership with the FHWA [Federal Highway Administration], point out "Fatigue has several causes: (from) inadequate rest, sleep loss and/or disrupted sleep; from stress; from displaced biological [circadian] rhythms, excessive physical activity such as driving or loading [cargo], or from excessive mental or cognitive work." (ATA, p. 8). The term "circadian" comes from the Latin words **circa dies**, or "about a day," **i.e.**, 24 hours. Circadian rhythms become displaced as a result of schedule irregularity that affects the time when people sleep. Adverse effects of sleep deprivation can occur when the opportunity to take sleep is curtailed, when people try to obtain sleep during periods of the day when their systems are in a more-active physiological state (such as during the mid-morning and early evenings), or when environmental conditions are not conducive to obtaining sleep.
> 65 F.R. 25553. [Emphasis supplied].

At 2:00 a.m. on January 3, 2001, Complainant refused to drive because he was very sleepy. Fitzgerald testified that he was prone to sleepiness between the hours of 2:00 a.m. and 5:00 a.m. The fact that humans are normally sleepier at night is dictated by their circadian rhythms. As noted by the FMCSA:

> Another concern of the panel was the difference between daytime and nighttime driving. Their report noted several problems with nighttime driving. First, as demonstrated by Wylie, C.D., **et al**. (1996), the strongest and most consistent factor influencing fatigue and alertness is time of day. Night driving was associated with a higher level of observed drowsiness, poorer lane-tracking, and degradation of mental performance. In addition, the panel

> noted evidence that daytime sleep is not as restorative as nighttime sleep, because fewer hours are spent sleeping and the quality of that sleep is poorer. Drivers generally agree that nighttime sleep is superior to daytime sleep (Abrams et al. (1997)). The result is that overall alertness and performance are lower in the nighttime than in the day, and accident risk is correspondingly higher. The Expert Panel report cites evidence suggesting that nighttime driving is associated with as much as a fourfold or more increase in fatigue-related crashes.

Id. at 25561-25562.

Complainant was also facing the difficulty of switching from nighttime sleeping to nighttime driving. The Federal Motor Carrier Safety Administration summarized the scientific studies and evidence on this point stating:

"It has been well established that hours of the day and night are not equivalent from perspective of human alertness and safe, efficient, and productive performance to workplace tasks. [citations to studies omitted]. Humans are biologically programmed to operate on a daily cycle of just over 24 hours. The cycles of daylight and darkness act as synchronizers. . . Shiftwork can introduce another problem. A nightshift worker, required to sleep during periods of higher physiological activity and to be awake during periods of lower activity, may have difficulty adjusting to an inverted wake-sleep schedule and can accumulate a sleep debt that can seriously affect the level of performance and safety. Even when a consistent schedule is established and wake-sleep patterns are stabilized, it is generally recognized that physiological and performance levels reach the low point of their cycles in the hours after midnight and in the early to mid-afternoon. Therefore, night workers are most susceptible to the dual predicament mentioned above. Unless the night shift worker is able to obtain sufficient restorative sleep on a regular basis, the risk of substandard and potentially unsafe performance increases." **Id**. at 25554.

Clearly, Complainant was so impaired, or so likely to become impaired, due to fatigue as to make it unsafe for him to operate a commercial motor vehicle from Framingham, MA to Syracuse, NY on the morning of January 3, 2001. Thus, his work refusal was protected under 49 U.S.C. § 31105 (a)(1)(B)(i) and 49 U.S.C. § 31105 (a)(1)(B)(ii), and I so find and conclude.

4. Fitzgerald engaged in protected activity on January 3, 2001 when he spoke separately with Ron Lavertu and John Patten.

When Complainant refused his dispatch to Syracuse on the morning of January 3, 2001, he told Ron Lavertu that he was "too tired" to take the shipment. He also told Lavertu that if he was forced to take the load and had an accident, he would have no

problems saying that he had been under a forced dispatch. (CX-13). Lavertu clearly understood that Complainant was claiming he was too tired to take the shipment safely to Syracuse, NY. These statements by Complainant to Lavertu were complaints "related to" violations of 49 C.F.R. § 392.3. Thus, they are protected under 49 U.S.C. § 31105(a)(1)(A), and I so find and conclude.

When Complainant spoke with John Patten on the afternoon of January 3, 2001, he told Patten that he had refused to take the shipment to Syracuse, NY because he was "too tired." Patten clearly understood that Complainant was claiming that he had become so sleepy that it would have been unsafe for him to drive to Syracuse, NY. It is well-settled that statements by a commercial truck driver to his dispatchers and managers about being "too tired" to transport shipments or to drive a truck are complaints "related to" violations of 49 C.F.R. § 392.3 and protected under the STAA. **Bettner v. Daymark Foods, Inc.**, 1997-STA-23 @ 10 (ALJ May 13, 1998)... **See also, Price v. E & M Express Co., Inc.**, 1987-STA-4 (Sec'y Nov. 23, 1987). As Complainant's statements to Lavertu and Patten about refusing the shipment to Syracuse were "related to" a violation of 49 C.F.R. § 392.3, they are protected under 49 U.S.C. § 31105(a)(1)(A), and I so find and conclude.

5. NFI was aware of Complainant's protected activity

As an additional element of proof of a **prima facie** case under the STAA, an employee must establish a nexus between the protected activity and the adverse action. **Stiles v. J.B. Hunt Transportation, Inc.**, 1992-STA-34 @ 2 (Sec'y. Sept. 24, 1993). The proof is usually provided by showing that the employer was aware of the protected activity when it took action adverse to the employee. **Sikau v. Bulkmatic Transport Co.**, 1994-STA-26 @ 3 (ALJ June 22, 1994); **Secretary v. Cavalier Homes of Alabama,** 1989-STA-10 @ 3 (Sec'y Nov. 16, 1990).

It is undisputed that NFI was aware of Complainant's complaints about recordation of waiting time on daily logs when Patten discharged him. Patten admitted that at least one such complaint was made to him. It is also undisputed that NFI was aware of Complainant's complaint about drug and alcohol testing. Patten conceded that Complainant made such a complaint, and I so find and conclude.

It is undisputed that NFI was aware of the basis for Complainant's refusal of dispatch on the morning of January 3, 2001 and his related statements about being "too tired" to transport the load safely to Syracuse, NY. Lavertu testified that Complainant told him he was "too tired" to take the shipment to Syracuse. In **Sickau v. Bulkmatic Transport Co.,** 1994-STA-26 (ALJ Oct. 21, 1994) truck driver's statement that "he had been working continuously for three weeks" and "that he was tired" had adequately conveyed to his dispatcher his refusal to drive based on protected activity. Here, both Lavertu and Patten understood that Complainant was claiming that he was too fatigued to operate safely

a commercial vehicle. Lavertu testified as follows:

Q. Okay. And then at some point in the evening, Mr. Fitzgerald -- at about 2:05 a.m. Mr. Fitzgerald advised you that he was tired and that he would not take the load.

A. Yes.

Q. Okay. You clearly understood that Mr. Fitzgerald believed he was too sleepy to safely deliver the load, correct?

A. If that's what a driver is telling me, yes.

Q. Well that is what he told you, right?

A. Yes.

(TR 111).

Patten testified as follows:

Q. Your whole conversation with Mr. Fitzgerald on January 3rd, 2000 was about or at least related to the ill or fatigued driver rule, didn't it?

A. It -- the conversation was about what happened the night before.

Q. Sure. And he told you couldn't do the run because he was tired, correct?

A. Uh-huh correct?

Q. And he told you he couldn't do the run because he was tired, correct?

A. Okay. Yes.

Q. Or at least you understood that, right?

A. I understood that, yeah.

Q. And when a driver says I was too tired you understand that he means it was not safe for him to do the run, correct?

A. Correct.

(TR 438-439)

Lavertu prepared a memorandum of his conversation with Complainant on the morning of January 3, 2001. (CX 13). Patten read and clearly understood the implications of this memorandum before he fired Complainant. (TR 429).

It is also manifestly clear that NFI had knowledge of Complainant's various complaints about working conditions, information gathering and letter writing campaign. This knowledge is evidenced by the E-mail that Lavertu sent to Patten wherein Lavertu said:

> **I'm tired of arguing with this guy and listening to him complain about everything. Is there something we can do? Is he that valuable to us? I've always been a little wary of him but when he mentioned being under forced dispatch, etc…..the red flags went up all over the place...** (Emphasis added)

(CX-13).[11]

It is clear that NFI was aware of complaints by Complainant related to safety. To be sure, the E-mail from Lavertu to Patten does not specifically reference knowledge of Complainant's information gathering and letter writing campaign. However, NFI had a very small shop at Framingham, MA. Only five office employees worked for NFI at that location. The fact that NFI had a small shop at Framingham, MA is sufficient in and of itself to warrant a finding that Complainant's information gathering campaign was known to Patten. **See Mulanax & Anderson v. Red Label Express**, 1995-STA-14 & 15 (ALJ July 7, 1995); **Ertel v Giroux Brothers Transportation, Inc.**, 1988-STA-24 (Sec'y Feb. 16, 1989). CX-13 shows that Patten and Lavertu had knowledge of Complainant's protected activities and establishes the causal nexus between Complainant's protected activity and his discharge, and I so find and conclude.

D. NFI TOOK ADVERSE ACTION AGAINST COMPLAINANT.

As part of his **prima facie** case under the STAA, Complainant had to prove that he was subjected to adverse employment action. The proximity in time between the protected activity and the adverse employment action is sufficient to raise the inference that the protected activity was the cause of the adverse employment action. **Kovas v. Morin Transport, Inc.**, 1992-STA-41 (Sec'y Oct. 1, 1993). **See also, Stiles v. J.B. Hunt Transportation, Inc.**, 1992-STA-34 @ 2 (Sec'y Sept. 24, 1993). It is undisputed that Patten discharged Complainant on January 3, 2001. As this Court noted on the record, Complainant had shown that he engaged in protected activity, that NFI was aware of the protected activity and that NFI took adverse employment action against the Complainant. Thus, the burden shifted to the employer, NFI, to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action.

E. COMPLAINANT'S ALLEGED INSUBORDINATION IS NOT A LEGITIMATE NONDISCRIMINATORY REASON FOR ADVERSE ACTION UNDER THE FACTS OF THIS CASE.

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[11]As noted above, I view this exhibit as the most important document in this case as it is the so-called "smoking gun."

Under the STAA, once a complainant has established a **prima facie** case of retaliation the burden shifts to the respondent to articulate a legitimate nondiscriminatory reason for the adverse action. **Texas Dept. of Community Affairs v. Burdine**, 450 U. S. 248, 255 (1981); **Brothers v. Liquid Transporters, Inc**., 1989-STA-1 (Sec'y Feb. 27, 1990) **slip op**. at 4. While NFI's burden is merely one of articulation, "the explanation must be legally sufficient to justify a judgment for the [employer]." **Texas Dept. of Community Affairs v. Burdine**, 450 U. S. 248, 255. **Brothers v. Liquid Transporters, Inc., supra**, **slip op.** 4-5 and n. 4. Here NFI's explanation for the discharge is not legally sufficient to justify a judgment for it, and I so find and conclude.

In **Kenneway v. Matlack**, 1988-STA-20 (Sec'y June 15, 1996), the complainant was fired after he refused a dispatch that would have caused him to violate 49 C.F.R. §395.3. The respondent there claimed that it fired the Complainant for vulgar and abusive language. In determining whether Kenneway's conduct was a legitimate nondiscriminatory reason for his discharge, the Secretary considered as persuasive labor relations cases where "[c]ourts have recognized that the use of intemperate language is associated with some forms of statutorily-protected activities ... due to the adversarial nature of these activities." **Id**. @ 3.

In **Kenneway**, the Secretary held that the right to engage in statutorily protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by insubordinate acts." **Kenneway @ 3, citing NLRB. v. Leece-Neville Co.**, 396 F.2d 773, 773 (5th Cir. 1968). The Secretary stated:

> A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline. The issue of whether an employee's actions are indefensible under the circumstances turns on the distinctive facts of the case.

In **Kenneway** the Secretary determined that, when balancing that complainant's refusal right against the respondent's right to maintain shop discipline, Matlack sustained little if any injury. The Secretary held that "In its context [complainant's] language was not insubordinate and Respondent's 'reason' for discharge is not legally sufficient to justify a judgment in its favor."

To fall outside of statutory protection this Complainant's conduct must be "indefensible under the circumstances." **See Kenneway, supra, cf. NLRB v. Southwestern Bell Telephone Co.**, 694 F.2d 974, 976-977 (5th Cir. 1982). Complainant's alleged conduct was not "indefensible under the circumstances." His statements to Patten on January 3, 2001 were made in the context of a legally protected complaint. Where a complainant who has engaged in a protected activity also engages in spontaneous intemperate conduct privately communicated over the telephone, the spontaneous,

intemperate conduct does not remove the statutory protection or provide the respondent with a legitimate, nondiscriminatory reason for adverse action. **Lajoie v. Environmental Management Systems, Inc.**, 1990-STA-3 (Sec'y Oct. 27, 1992). Here, the statements that Patten claims led him to discharge Complainant were made privately and, therefore, did not "upset the balance that must be maintained between protected activity and shop discipline," and I so find and conclude.

F. NFI'S ARTICULATED REASONS FOR DISCHARGING COMPLAINANT ARE PRETEXTUAL.

If, on the other hand, reviewing authorities should find that NFI has articulated a legitimate, nondiscriminatory reason for discharging Complainant, I further find and conclude that those reasons are clearly a pretext. First, the E-mail from Ronald Lavertu to John Patten and Dan McCloskey on the morning of January 3, 2001, clearly shows that Lavertu had, at a minimum, suggested strongly to Patten that Complainant be discharged. The language in the E-mail stating: "Is there something we can do? Is he that valuable to us?" shows that Lavertu wanted Complainant fired, and I so find and conclude. Patten apparently agreed with Lavertu's suggestion as he discharged Complainant the very next day.

That the claim of insubordination is a pretext to discharging Complainant for engaging in protected activity is also evidenced by Lavertu's testimony that he was frustrated with Complainant's refusal of the dispatch on the morning of January 3, 2001 and Complainant's statements about "forced dispatch" and related argument. In fact, Lavertu testified that he could not recall ever having issued a memo similar to CX-13 concerning other drivers who had not refused a dispatch due to being tired.[12] (TR 333-334). Patten's immediate statement to Complainant when Complainant called him on January 3, 2001, was that he was still trying to cover the load that Complainant had refused to take to Syracuse, NY early on the morning of January 3, 2001.

NFI can find little support for its claim that it treated Complainant the same as other drivers who were insubordinate. In response to Complainant's NLRB complaint, NFI provided information relating to drivers other than Complainant who had been fired for "insubordination." It provided information relating only to the discharge of one other driver for "insubordination." (CX-8; TR 397). The other driver, whom NFI properly discharged for insubordination, threatened to assault a manager, slammed the door at the office and was uncooperative in the administration of a drug test. (CX 8; TR 399-400). Anne Johnson admitted that threatening a manager with assault was a more serious infraction than "cussing out a boss." (TR 399). Johnson testified that she was unaware of any other drivers fired for insubordination. (TR 398).

[12]I would note, in passing, that such threatening memos are usually not reduced to writing.

G. NFI HAS FAILED TO MEET ITS BURDEN TO SHOW THAT IT WOULD HAVE DISCHARGED COMPLAINANT IN THE ABSENCE OF HIS PROTECTED ACTIVITY.

If reviewing authorities should find that NFI has articulated a legitimate nondiscriminatory reason for firing Complainant that is not pretextual, then a dual motive analysis is implicated here. NFI must prove that it would have taken the same adverse action in the absence of the protected activity. **Caimano v. Brink's, Incorporated**, 95-STA-4 @ 9 (Sec'y' Jan. 26, 1996). Merely showing that the employee was "in part" discharged for legitimate reasons does not meet the employer's burden. **Davis v. H.R. Hill, Inc.**, 86-STA-18 (Sec'y Mar. 19, 1987). NFI has failed to meet its burden to show that in the absence of Complainant's protected activities it would have fired him, and I so find and conclude.

Lavertu testified that his frustration with Complainant's refusal to take the load to Syracuse on January 3, 2001, and Complainant's statements about "forced dispatch" and being "too tired" to take the load, motivated him to send CX-13 to Patten. Lavertu acknowledged that the events in question on the January 3, 2001 would not have happened had Complainant simply taken the load to Syracuse. (TR 329). Patten testified that he read and clearly understood this memorandum before he fired Complainant. Moreover, the first thing Patten said to Complainant on the afternoon of January 3, 2001 was that he was still trying to cover the load Complainant refused to take the previous evening. Thus, it is clear, that even if Complainant was insubordinate by challenging Patten's authority, Complainant's protected activity also contributed to Patten's motivation in discharging Complainant, and I so find and conclude.

An employer's "failure to adduce testimony that projects a clear image of the shortcomings in [the employee's] work performance allegedly relied on by [the employer] casts further doubt on whether [the employer] was motivated solely by those factors." **Timmons v. Franklin Electric Cooperative**, 1997-SWD-2 (ARB Dec. 1, 1998), slip op. at 5; **See also Lieberman v. Gant,** 630 F.2d 1003, 1012 (1st Cir. 1979). Here, NFI's "Driver Personnel Action Form" states that Complainant was discharged for "poor performance, "misconduct" and "attitude" (RX-3). NFI failed to establish any shortcomings in Complainant's work performance and attitude. NFI could point to no incidents involving Complainant's "poor" work performance other than his refusal to take the shipment to Syracuse, NY on the morning of January 3, 2001. NFI could point to no incidents of "bad attitude" by Complainant other than his repeated complaints that Lavertu was "tired of arguing" with Fitzgerald and Complainant's complaint to Patten on the afternoon of January 3, 2001. NFI could not point to any incidents of insubordination by Complainant other than the alleged disrespectful statements to Patten on January 3, 2001. As indicated above, these alleged disrespectful statements are not a legitimate, nondiscriminatory reason for adverse employment action, and I so find and conclude.

In dual motive cases a respondent bears the risk that the influence of legal and illegal motives cannot be separated. **Mackowiak v. University Nuclear Systems, Inc.**, 735 F.2d 1159, 1164 (9th Cir. 1984). Here, NFI has failed to meet its burden of proof and thus must bear the risk that its illegal motives in terminating Complainant cannot be separated from its alleged claim of insubordination. While there was some evidence showing that Complainant was, perhaps, intemperate with respect to his statements to Patten on the afternoon of January 3, 2001, NFI offered no proof or testimony that it would have discharged Complainant in the absence of his protected safety complaints and his protected refusal to drive to Syracuse, NY on the morning of January 3, 2001. NFI's failure to meet its burden is fatal to its defense, and I so find and conclude. **Moravec v. H.C.& M, Inc.**, 1990-STA-44 (Sec'y Jan. 6, 1992) n. 7, **citing McGavock v. Elbar, Inc.**, 1986-STA-5 (Sec'y July 9, 1986).

H. RESPONDENT FAILED TO MEET ITS BURDEN OF PROVING THAT THE COMPLAINANT FAILED TO MITIGATE HIS DAMAGES.

In an action under the STAA, it is well-settled that the burden of proving that a complainant failed to mitigate his damages is upon the employer. **Polwesky v. B & L Lines, Inc.**, 1990-STA-21 (Sec'y May 29, 1991), citing **Carrero v. N.Y. Hous. Auth.**, 890 F.2d. 569 (2d Cir. 1989) and **Rasimas v. Michigan Dep't. of Mental Health**, 714 F.2d 614 (6th Cir. 1983). Here NFI failed to show that Complainant failed to make reasonable efforts to mitigate his damages, and I so find and conclude.

The standard of determining whether a respondent such as NFI met its burden of establishing this Complainant's failure to mitigate damages is whether the Complainant "intentionally or heedlessly" failed to protect his own interests. **Lansdale v. Intermodal Cartage**, 1994-STA-22, **aff'd sub nom. Intermodal Cartage v. Reich**, 113 F.3d 1235 (6TH Cir. 1997).

In **Intermodal Cartage v. Reich**, **supra**, the court wrote:

"An employee discharged in violation of the [Surface Transportation Assistance] Act has a duty to mitigate damages by seeking other substantially equivalent employment. The employer can assert the employee's failure to do so as a defense against liability for back pay. However, the failure-to-mitigate defense will be difficult to sustain if the facts are at all favorable to the employee."

Here the facts, in my judgment, are favorable to Complainant. Complainant sent more than thirty (30) resumes to prospective employers. He checked want ads and registered with the Massachusetts website for purposes of seeking employment. Complainant ultimately obtained driving jobs with Boston Coach and Coach USA.

As the employer, NFI has the burden to show that there were

substantially equivalent positions available and that Complainant did not use reasonable care and diligence in seeking such positions. To carry that burden, NFI must show both that there were substantially equivalent positions available and that Complainant did not use reasonable care in diligence in seeking such positions. **Moyer v. Yellow Freight Systems, Inc.**, 1989-STA-7 @ 4 (Sec'y Aug. 21, 1995). NFI offered absolutely no evidence that positions were available that were substantially equivalent to Complainant's job with NFI While Complainant obtained work in positions paying substantially less than his previous employment with NFI, an employee who has taken reasonable, but unsuccessful, steps to obtain substantially equivalent employment may, after a reasonable period of time, consider other suitable employment at a lower rate of pay. **Cook v. Guardian Lubricants, Inc.**, 1995-STA-43 (ARB May 30, 1997).

After NFI illegally fired him, Complainant did not willfully disregard his financial interest and a breach of his duty to mitigate his damages. There is absolutely nothing in the record to show that the Complainant carelessly or heedlessly failed to protect his interest. Moreover, NFI has not offered even a scintilla of evidence to show that employment was available to Complainant that was substantially equivalent to his job with NFI, and I so find and conclude.

I. COMPLAINANT IS ENTITLED TO REINSTATEMENT, BACK PAY, AND COSTS AND ATTORNEY FEES.

Under 49 U.S.C. § 31105(b)(2)(A) a successful complainant is entitled to be reinstated to his former position, compensatory damages, and attorney fees and costs. As evidenced by NFI's payroll records (CX-10) NFI paid Complainant wages of $50,008.24 during the 38-week period from April 14, 2000 to Complainant's discharge. Thus his average weekly wage from April 14, 2000 to January 3, 2001 was $1,316. Complainant projects that had his employment with NFI continued he would have earned $117,124 from January 3, 2001 to September 17, 2002, the date of Complainant's brief. ($1,316 x 89 weeks). This amount should be offset by Complainant's interim wages.

Complainant earned $ 8,241.37 from Boston Coach in 2001. (CX 11, p.1). He earned $8,964.73 from Boston Coach in 2002. (CX 11, p. 2). He earned $9,506.40 for Coach USA in 2002 through the pay period ending June 9, 2002. (CX-11, p. 3 & 4). Complainant's rate of pay with Coach USA is $13.20 per hour, or $528 per week based on a 40-hour paid week. Complainant's wage loss damages to date are estimated as follows:

Projected NFI wages – 1/03/01 to 9/17/02:	$ 117,124.00
Less Actual Interim Wages to 6/09/02:	(26,712.50)

1. Back Wages

An award of back pay in an appropriate amount is mandated once it is determined that an employer violated the Act. **Moravec v. HC & M Transportation, Inc.**, 1990-STA-44 (Sec'y Jan. 6, 1992), **citing Hufstetler v. Roadway Express, Inc.**, 1985-STA-8 (Sec'y Aug. 21, 1986), slip op at 50, **aff'd sub nom., Roadway Express, Inc. v. Brock**, 830 F.2d 179 (11th Cir. 1987. Back pay awards are to be calculated in accordance with the make-whole remedial scheme embodied in § 706 of Title VII of the Civil rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988). **See, Loeffler v. Frank,** 489 U.S. 549 (1988). NFI paid Complainant wages of $50,008.24 during the 38-week period from April 14, 2000 to Complainant's discharge. Thus his average weekly wage from April 14, 2000 to January 3, 2001 was $1,316. Complainant projects that had his employment with NFI continued he would have earned $117,124 from January 3, 2001 to September 17, 2002, the date of his brief. Back pay calculations must be reasonable and support by the evidence in the record, but need not be rendered with "unrealistic exactitude." **Cook v. Guardian Lubricants, Inc.**, 1995-STA-43 (ARB May 30, 1997). Back pay awards are, at best, approximate and any "uncertainties in determining what an employee would have earned but for the discriminations should be resolved against the discriminating employer." **Pettway v. American Cast Iron Pipe Co.**, 494 F.2d 211, 260-61 (5th Cir. 1974).

Projected Interim Wages
June 10 to September 17, 2002:
(7,392.00)

Wage loss damages as of September 17, 2002: $83,019.50 Complainant's wage loss will continue to accrue at a rate of $788 per week ($1,316 - $528) and I so find and

concl
ude.

2. Conclusion and Relief Sought Herein

Complainant engaged in activities protected under 49 U.S.C. § 31105. NFI was aware of Complainant's protected activity and has failed to articulate a legitimate, nondiscriminatory reason for the discharge. As NFI clearly discharged Complainant for engaging in protected activities, Complainant is entitled to the following relief under the STAA, and I so find and conclude.

(1) Reinstatement to Complainant to his former position with NFI at his then level of seniority, including the benefits and other rights of employment that he enjoyed.

(2) Back pay of $83,019.50, plus $788 weekly from and after September 17, 2002 until reinstatement;

Furthermore where an employer has violated the Act and the complainant is entitled to an offer of reinstatement to his former position and to back pay, the employer's liability for back pay continues until such time as the reinstates the complainant or makes him a bona fide offer of reinstatement. **Polewsky v. B & L Lines, Inc.**, 1990-STA-21 (Sec'y May 29, 1991). Therefore, Complainant is entitled to back pay in the amount of $83,019.50, as well as $788 per week from and after September 17, 2002 until Complainant is reinstated.

3. Interest on Back Pay

Complainant is entitled to interest on the back pay to compensate for loss suffered due to NFI having deprived him of the use of his money. **Hufstetler v. Roadway Express, Inc**., 1985-STA-8 (Sec'y Aug. 21, 1986), **aff'd sub nom**., **Roadway Express, Inc. v. Brock**, 830 F.2d 179 (11th Cir. 1987) Prejudgment interest shall be calculated in accordance with 26 U.S.C. § 6621 (1988), which specifies the rate for used in computing interest charged on underpayment of Federal taxes. **See Park v. McLean Transportation Services, Inc.**, 1991-STA-47 (Sec'y June 15, 1992), **slip op.** at 5; **Clay v. Castle Oil Co., Inc.,** 1990-STA-37 (Sec'y June 3, 1994).

4. Attorney Fees

Attorney Taylor shall submit his fee petition relating to the legal services rendered and litigation expenses incurred in representing Complainant in this matter. The fee petition shall be filed within thirty (30) days of receipt of this Recommended Decision and Order and Respondent's counsel shall have fourteen (14) days to comment thereon.

5. Posting of Notice of Decision

It is appropriate to require Respondents to post this decision

at the facility where Complainant worked. **Scott v. Roadway Express, Inc.**, 1998-STA-8 (ARB July 28, 1999). In **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB Aug. 27, 1998), the respondent therein was ordered to post the decision of the ARB and an earlier Secretary of Labor remand decision, in a lunchroom and another prominent place accessible to its employees for a period of 90 days.

Accordingly, in view of the foregoing, I issue the following:*

RECOMMENDED ORDER

It is **ORDERED** that:

1. Respondent reinstate Complainant to his previous position as a truck driver with full seniority, privileges of employment and benefits effective immediately;

2. Respondent expunge from its personnel files and record system all documents relating to Complainant's illegal discharge on January 3, 2002;

3. Respondent pay to Complainant back wages of $83,019.50, plus $788 weekly from September 17, 2002 until reinstatement;

4. Respondent pay to Complainant interest on the back pay award calculated in accordance with 29 U.S.C. § 6621;

5. Post a copy of this decision for ninety (90) days in a prominent place accessible to employees at its office in Framingham, MA.

6. Respondent pay Complainant's attorney fees and litigation expenses, and such award will be made in a supplemental Recommended Decision and Order.

A

DAVID W. DI NARDI
District Chief Judge

DWD:dr
Boston, Massachusetts